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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-11

ROOSEVELT F. PALMORE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE
DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR APPELLANT

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ROOSEVELT F. PALMORE,

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ON APPEAL FROM THE
DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR APPELLANT

OPINION BELOW

The opinion of the District of Columbia Court of Appeals is reported at 290 A.2d 573 and is reproduced in the single appendix (A.[1] 52). The oral opinion of the Superior Court of the District of Columbia is not officially reported, but is set forth in the single appendix (A. 8-11).

[1] The abbreviation "A" refers to the single appendix containing relevant portions of the record filed pursuant to Rule 36 of the Rules of this Court.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on April 28, 1972 (A. 69). A notice of appeal was filed in that court on May 9, 1972 (A. 70), and the record and jurisdictional statement were docketed in this Court on June 30, 1972. On October 10, 1972, this Court entered an order postponing consideration of the question of jurisdiction until the hearing of this case on the merits. For reasons set forth, *infra*, pp. 14-20, appellant contends that this Court's appellate jurisdiction has been properly invoked pursuant to the provisions of 11 D.C. Code §102 (1971) and 28 U.S.C. §1257(2). In the alternative, appellant invokes the jurisdiction of this Court to issue a writ of certiorari to the District of Columbia Court of Appeals pursuant to 28 U.S.C. §§ 1257(3), 2103, 2111.

QUESTIONS PRESENTED

1. Is an Act of Congress applicable exclusively to the District of Columbia "a law of [a] state" within the meaning of 28 U.S.C. §1257(2) as that statute is now made applicable to appeals from the District of Columbia Court of Appeals by 11 D.C. Code §102 (1971)?

2. Is a defendant charged by the United States of America with commission of a felony in the District of Columbia in violation of an Act of Congress enacted pursuant to Article I, §8 cl. 17 of the Constitution entitled, on timely demand, to have his case heard and determined by a court "ordained and established" in accordance with Article III, §1 of the Constitution?

3. Does the Fourth Amendment to the Constitution protect a motorist who has violated no law or traffic ordinance, and about whom police officers have no

articulable facts, from being selected by those officers and forcibly stopped for inspection of his driver's license and motor vehicle registration permit so that admission into evidence, over timely objection, of a gun discovered by the officers during such a selective forcible stop was error?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following sections of the District of Columbia Court Reorganization Act of 1970, 84 Stat. 473, are challenged on this appeal as repugnant to Article III, §1 of the Constitution: 11 D.C. Code §§101, 721(a), 923(a), 923(b)(1). Also involved are Article I, §8, cl. 17 and the Fourth Amendment to the Constitution, as well as 28 U.S.C. §1257, 11 D.C. Code §102, 22 D.C. Code §3204, and 40 D.C. Code §§104(a), 301(c). Pertinent portions of these constitutional and statutory provisions are set forth in the appendix, *infra*, pp. 1a-5a.

STATEMENT OF THE CASE

INTRODUCTION

Resolution of appellant's contention that the appellate jurisdiction of this Court has been properly invoked, *infra*, pp. 14-20, and that he was entitled to have his case heard and determined by a court "ordained and established" in accordance with the provisions of Article III, §1 of the Constitution, *infra*, pp. 20-46, does not require detailed consideration of the particular facts surrounding appellant's arrest, indictment, and trial. Thus, for the Court's convenience, we first set forth a summary of the pertinent developments of the case

sufficient to permit full consideration of these issues. Thereafter, as necessary for disposition of appellant's Fourth Amendment claim, *infra*, pp.47-61, we detail the pertinent facts of this case.

A. Summary of the Case

On February 23, 1971 a grand jury returned an indictment in the Superior Court of the District of Columbia charging appellant with carrying a dangerous weapon, a gun, in violation of the felony provisions of 22 D.C. Code §3204.[2] The Superior Court is not a court ordained and established in accordance with Article III, §1 of the Constitution. 11 D.C. Code §101 (1971). Prior to trial, appellant moved to dismiss the indictment, contending that only a court ordained and established in accordance with Article III of the Constitution had jurisdiction to hear and determine the charge against him (A. 4). The trial judge denied that motion. Thereafter, appellant was tried and convicted by the Superior Court and sentenced to imprisonment. An appeal was taken to the District of Columbia Court of Appeals where appellant again contended that he was entitled to have his case heard and determined by an Article III court.[3] In

[2]The crime proscribed by §3204 carries a misdemeanor punishment of imprisonment for not more than one year unless the accused has previously been convicted in the District of Columbia of a violation of §3204 or of any felony in the District of Columbia, or elsewhere, in which case a felony punishment of imprisonment for not more than ten years is provided. At arraignment, the Government filed an information of prior conviction (A. 3), and the case proceeded as a felony. The punishment imposed was a felony punishment (A. 50).

[3]Appellant also challenged the jurisdiction of the District of Columbia Court of Appeals on Article III grounds. See Brief for Appellant at 1, n. 1, in the District of Columbia Court of Appeals. The jurisdiction of the court of appeals has not been raised as a separate issue here since it is fairly embraced within the challenge to the trial court's jurisdiction.

both the Superior Court and the District of Columbia Court of Appeals, appellant contended that so much of the Court Reorganization Act of 1970, 84 Stat. 473, as purported to vest jurisdiction in the non-Article III "local" courts to hear and determine felony prosecutions was repugnant to Article III of the Constitution. The court of appeals affirmed appellant's conviction, 290 A.2d 573; A. 52, and appellant timely noted an appeal to this Court pursuant to the provisions of 11 D.C. Code §102 and 28 U.S.C. §1257(2).

B. The Facts

On January 16, 1971 Officers Busker and Morrissette were assigned to the Special Operations Division ("S.O.D.") of the Washington, D.C. Metropolitan Police Department, working in casual clothes in an unmarked police vehicle (A. 12). At about 8:00 p.m., these officers were parked at a curb when they observed appellant's car drive by (A. 20). Appellant had violated no law or traffic regulation, there was no apparent equipment defect on his automobile, and the officers had received no word that this vehicle was reported stolen (290 A.2d at 581; A. 61-62). Noting that the car had Virginia rental "tags" (A. 12),[4] the officers decided to stop appellant for the purpose of a "spot check" (A. 18, 35),[5] pursuant to instructions given them by "the commanding officer of

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[4]The officer testified that he was able to identify rental automobiles by the distinctive series of numbers assigned to the license plates (A. 13).

[5]A "spot check," also referred to interchangeably as a "traffic check" (A. 25), consists of stopping a vehicle and demanding that the operator produce for inspection his driver's license and registration certificate. (A. 18, 38).

S.O.D., our lieutenant, and our sergeants" (A. 19, 35). Officer Busker had never been instructed as to the basis by which he was to select a particular vehicle for a "spot check," and he believed that "this is left up to each individual officer" (A. 19). While his reason for stopping a particular automobile varies at "a given time" (A. 19), Officer Busker frequently stops rented automobiles and had been doing so for "over a year" when this case was tried (A. 22). He stops rented cars because:

> "... a lot of these cars are rented, and are not taken back on time, and on other occasions I have personally known where an officer stopped a rental car and got about $6,000 worth of dope out of the car" (A. 21).

Officer Busker testified that he was concerned about overdue rental cars because "it's a criminal charge" to operate a rental car with an overdue agreement (A. 26),[6] and he thus conducts "spot checks" so that "the man driving can prove that it's his car" (A. 25).[7]

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[6]Contrary to the officer's understanding, it is not a crime to operate a rented automobile with an expired agreement in the District of Columbia. *United States v. McLaughlin*, 278 F. Supp. 320 (D.D.C., 1967).

[7]Officer Morrissette, on the other hand, testified that his superiors had told him:

> "We could stop the kind of car that maybe a young teenager would be driver [sic] that you might think he was under age and didn't have a permit. You could stop a car that you suspected might be stolen. You could stop a car that just for not even having a taillight, you can stop the car, and when you inform the driver of the car that his taillight is out you also ask him for his permit and registration" (A. 36-37).

Officer Morrissette testified that it was not his "policy" to make "spot checks" of automobiles that did not fall into the categories which he listed (A. 37), and he did not recall ever having stopped a car for a "spot check" which was operated by a businessman in a suit (A. 37). The decision to stop appellant's car, however, was made by Officer Busker, not Officer Morrissette (A. 20, 35).

The Special Operations Division has prepared a form for its officers to complete when "spot checks" are made (A. 35). This form, which is not a numbered police department form (A. 36),[8] is handed in at the conclusion of an officer's duty and lists "the information that the department would like", including "the name, the address of the person driving, the color of the vehicle, the tag number, the driver's permit number, and the color, the number of occupants in it" (A. 35-36).

Pursuant to this "spot check" policy, the officers activated their red police light and siren and advised two other plainclothes officers, in a second unmarked police car, of their intentions (A. 20, 22, 29, 30). The second police car proceeded to "assist" in the "spot check" (A. 29, 38-39). Appellant pulled his car to a stop, got out of the vehicle, and walked toward Officer Busker (A. 14), who asked to inspect appellant's driver's permit and rental agreement form (A. 15). Appellant immediately produced a valid driver's license (A. 15) and returned to the automobile to obtain the rental form which was in the glove compartment (A. 15).[9]

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[8]Officer Busker testified that no written records of "spot checks" are made (A. 20), while Officer Morrissette testified that such records are made on special S.O.D. forms, but not on official police department forms (A. 35-36). The opinion of the district court in *Gomez v. Wilson*, 323 F. Supp. 87, 90 (D.D.C., 1971), published after the trial of this case, shows that there is an official police department form, Form No. 725, which is used to record "spot checks" of "suspicious vehicles" and "suspicious pedestrians" and that these forms "are turned in [and] filed and cross-indexed by name, nickname, stop location and (for motorists) tag number." 323 F. Supp. at 90 and n. 4.

[9]The police officer testified that appellant was not free to refuse his request to inspect these documents nor to leave the scene until he had complied with the officer's demand, and the officer would have prevented appellant from leaving had he attempted to do so (A. 28).

Appellant retrieved his rental agreement from the car and delivered it to Officer Busker. That agreement bore an expiration date several days earlier, and the officer engaged appellant in a conversation lasting a minute or two "about the rental agreement" (A. 18, 23).[10] While this conversation was taking place, Officer Morrissette stationed himself on the passenger side of the automobile in order to "protect" his partner (A. 38). He was "observing everything that might be inside the car" (A. 37) because there might be "numerous things in the glove compartment that [appellant] could be charged with" (A. 40). By shining his flashlight beam into the car (A. 32) and by "bending [his] torso" (A. 37), Officer Morissette observed "the hammer mechanism" of a gun under the lowered armrest (A. 32). He notified Officer Busker of his discovery, and appellant was placed under arrest (A. 18, 32-33).

At the conclusion of the testimony, the trial court held that the officers' conduct was not "unreasonable even under the Fourth Amendment to the Constitution" (A. 42) and denied the motion to suppress evidence (A. 43-44). Appellant elected to stand on his motion to suppress and, trial by jury having been waived (A. 6-7), it was stipulated that the court could consider the officers' testimony given at the hearing as if repeated at trial. It was further stipulated that appellant did not have a permit to carry a gun on January 16, 1971 and that the gun taken from his car was subsequently test-fired successfully (A. 49,

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[10]The court of appeals observed: "Appellant explained (and his story was later verified by the car rental agency) that he had modified the agreement orally prior to its expiration and that, although the written agreement did not so indicate, he was in fact entitled to drive the car by reason of the oral extension of his rental period." 290 A.2d at 581; A. 61.

[11] These are formal elements of the statutory offense proscribed by 22 D.C. Code §3204 (1967).

41-44).[11] The trial court overruled appellant's objection to the Government's offer of the gun into evidence (A. 44-45) and found appellant guilty (A. 47).

Appellant was thereafter sentenced to imprisonment for not less than two years, nor more than six years, execution of which was suspended, save for 180 days of confinement, on six years probation (A. 50). A timely appeal was taken to the District of Columbia Court of Appeals. On April 28, 1971, that court affirmed appellant's conviction (A. 69).

SUMMARY OF ARGUMENT

I.

In reorganizing the courts in the District of Columbia, Congress distinguished Acts of Congress of national applicability from those of local applicability. Jurisdiction over local statutes was vested in the local courts, and review in this Court from the final judgment of the highest local court is to be accomplished in accordance with 28 U.S.C. §1257. We submit that under this statutory scheme, a local statute is now to be deemed a "statute of a state" within the meaning of 28 U.S.C. §1257(2). This construction is required to harmonize the mode of review for final judgments of the District of Columbia Court of Appeals which Congress has provided in 11 D.C. Code §102 (1971). This construction, moreover, is the only construction which gives full meaning to the jurisdictional statute which Congress enacted. Finally, this construction is the same construction which this Court put on a similar jurisdictional statute more than fifty years ago. *Balzac v. Porto Rico*, 258 U.S. 298. For these reasons, we submit that this appeal was properly taken with respect to appellant's

claim that a local statute is repugnant to the federal Constitution. That being so, appellant's Fourth Amendment claim, while independently incapable of sustaining an appeal, is properly here. *Prudential Insurance Co. v. Cheek*, 259 U.S. 530, 547; *Mishkin v. New York*, 383 U.S. 502, 512-513.[12]

II.

Appellant stood trial on a felony indictment brought by the United States of America and charging a violation of an Act of Congress applicable exclusively to the District of Columbia. Over his timely objection, he was tried, convicted, and sentenced to imprisonment by a court not ordained and established pursuant to Article III of the Constitution. We contend that this was constitutional error. It is clear that an Act of Congress, albeit one applicable only to the District of Columbia, is a "law of the United States" within the meaning of Article III, §2 of the Constitution. It is also clear that a felony prosecution brought for violation of such a statute is a case "arising under" federal law within the meaning of Article III, §2, and it is conceded that neither legislative power nor executive power may be exercised in the hearing and determination of such a case. Thus, a so-called "legislative court," that is, a tribunal utilizing the judicial process but exercising legislative or executive power, was not competent to hear and determine appellant's case.

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[12]In any event, this Court's jurisdiction to review the judgment of the District of Columbia Court of Appeals by writ of certiorari is uncontestably plain, 11 D.C. Code §102 (1971); 28 U.S.C. §1257(3), and in the event the Court concludes that this appeal was improvidently noted, it nonetheless has jurisdiction to review the judgment in the exercise of its certiorari power.

There is nothing in Article I, §8, cl. 17 that authorizes Congress to disregard the mandate of Article III when it ordains and establishes the inferior courts to sit in the District of Columbia and exercise the judicial power of the United States. To be sure, Congress has plenary legislative power over the District of Columbia. Pursuant to that power, it may pass laws applicable to the District of Columbia without resorting to any of its other Article I powers. But, as the Court has repeatedly made clear, Congress may not disregard other provisions of the federal Constitution when it enacts laws for the District of Columbia. Thus, Congress must afford criminal defendants in the District of Columbia the right to grand jury indictment, and it must afford to criminal defendants in the District of Columbia a right to a trial by jury pursuant to Article III, §2 of the Constitution. And, we submit, Congress may not disregard the command of Article III when it "ordains and establishes" tribunals inferior to this Court to exercise the judicial power of the United States within the District of Columbia. *O'Donoghue v. United States*, 289 U.S. 516.

The fact that justices of the peace initially exercised jurisdiction in minor criminal offenses not involving punishments in excess of one year in jail and that those justices were not Article III officers, does not justify a departure from Article III's mandatory command. From the very beginning, Congress has treated such offenses as "legislative" or "municipal" matters. For present purposes, we can assume that Congress was correct and that there is a class of minor criminal offenses that would permit of, but do not necessarily require, exercise of the judicial power. That practice, historically limited to minor offenses, affords no justification for the wholesale abandonment of Article III's protections in serious felony cases.

Nor can disregard of Article III's command be justified by reference to the practice in the territories. The territorial courts were created out of necessity to accommodate the need for a judicial system in places not part of the permanent Union. That practice has no bearing on the applicability of Article III in the District of Columbia.

Finally, even if Congress could somehow be free of the command of Article III, if there were an overriding necessity for such freedom in order to carry out its legislative responsibilities in the District of Columbia, this piece of legislation could not stand. The legislative history makes it abundantly clear that Congress' quarrel with Article III is not that it makes impossible the discharge of Congress' plenary power in the District of Columbia but instead that it makes judges too independent. That may be a valid reason for proposing an amendment to Article III; it cannot justify its disregard.

III.

The evidence against appellant was obtained during a forcible, selective "spot check" of his driver's license and motor vehicle registration certificate. It is conceded that, at the time appellant was selected for such a check, the police officers had no basis to believe that he had engaged in criminal activity, and appellant had violated no law or traffic ordinance. The "spot check" was conducted by two plainclothes police officers, in an unmarked car, assisted by two other plainclothes officers in a second unmarked police car. These officers were acting in accordance with a "spot check" policy instituted by their superiors whereby individual officers are instructed to exercise their discretion to select individuals for such checks. This procedure includes the completion of formal

and informal forms which are completed by the officers and centrally filed and cross-indexed by the police department.

When appellant was forcibly stopped by police officers, he was "seized" within the meaning of the Fourth Amendment. Such a seizure is unreasonable and therefore condemned by the Fourth Amendment unless, at a minimum, police officers can point to specific and articulable facts which warrant the intrusion into personal liberty. Here, as the court of appeals expressly found, no such Fourth Amendment basis existed for the forcible stop, and the stop was accordingly violative of appellant's Fourth Amendment rights unless, as the court of appeals held, "health and safety" considerations justify departure from the minimum "articulable suspicion" standard.

In this case, there are no "health and safety" considerations. The record, viewed most favorably to the Government, shows that appellant was stopped, not for the purpose of ensuring compliance with safety regulations, but to investigate criminal conduct. As the stopping officers candidly admitted, appellant was stopped to see whether he was committing a criminal offense by operating an overdue rented automobile. A stop to investigate possible criminal behavior cannot be insulated from Fourth Amendment standards by the simple device of affixing a "health and safety" label to the police intrusion into the individual's right of movement.

Even if this were a "health and safety" case, the selective stopping of motorists under a police department policy such as is followed in the District of Columbia, whereby the individual officer on the street is given unbridled

discretion to select individuals for such seizures, unaided by any objective and non-discriminatory factors, cannot pass Fourth Amendment muster. While the Fourth Amendment will accommodate such "health and safety" inspections, it does not exempt such inspections from the constitutional requirement of reasonableness. With a procedure as potentially dangerous to Fourth Amendment freedoms as the practice of "spot checks," the Fourth Amendment commands the police to follow one of two alternatives. Either such check must be accomplished on an objective, non-discriminatory basis comparable to the area-wide inspection of dwellings held reasonable in *Camara v. Municipal Court*, 387 U.S. 523, or such checks, if they are to be conducted on a subjective, selective basis must be subject to the Fourth Amendment requirement of "articulable suspicion" enunciated in cases such as *Adams v. Williams*, 407 U.S. 143, and *Terry v. Ohio*, 392 U.S. 1. On neither basis, however, can the seizure of appellant survive Fourth Amendment scrutiny.

ARGUMENT

I.

THIS CASE IS PROPERLY HERE ON APPEAL

Both in the trial court and the District of Columbia Court of Appeals, appellant contended that so much of the District of Columbia Court Reorganization Act of 1970, 84 Stat. 473, as purports to vest jurisdiction to hear and determine felony cases in "courts" not ordained and established in accordance with Article III, §1 of the Constitution was repugnant to that constitutional provision.[13] That contention having been decided

[13]The claim of constitutional repugnance was timely raised both in the trial court and the District of Columbia Court of Appeals. See Defendant's Memorandum of Points and Authorities in

adversely to him in the court below, appellant timely noted an appeal to this Court from the final judgment of the District of Columbia Court of Appeals, the highest court in the District of Columbia wherein a decision could be had,[14] pursuant to 11 D.C. Code § 102 (1971) and 28 U.S.C. § 1257(2). The questoin of jurisdiction having been postponed until the hearing of the case on the merits, we turn at the outset to a demonstration that this Court's appellate jurisdiction has been properly invoked. Rule 26(6) of the Rules of this Court.

We start from the premise that, at least in this case involving only the mode not the availability of review, this Court's appellate jurisdiction is purely statutory. *E.g., Heike v. United States*, 217 U.S. 423, 428; *American Construction Co. v. Jacksonville Railway*, 148 U.S. 372, 378. Since it is clear that the claim of constitutional repugnance was properly raised at all stages of the proceedings, and since the appeal was both noted and docketed in timely fashion, the dispositive issue is whether a "local" statute, *i.e.*, a law enacted by Congress and applicable exclusively to the District of Columbia, is a "statute of the United States" within the meaning of 28

Support of Motion to Dismiss Indictment, pp. 1-5 (Superior Court); Brief for Appellant, pp. 9-16 (District of Columbia Court of Appeals). Both the memorandum and the brief are in the record on appeal.

[14] 28 U.S.C. § 1257 (1971). Since appellant's case did not involve violation "of criminal laws of the United States which are not applicable exclusively to the District of Columbia," review in the United States Court of Appeals for the District of Columbia Circuit pursuant to 11 D.C. Code § 301 (1971), following affirmance by the District of Columbia Court of Appeals, was not available.

U.S.C. §1257(1) or a "statute of [a] state" within the meaning of 28 U.S.C. §1257(2).

The United States contends that a local statute is a "statute of the United States" within the meaning of the first subsection of §1257. If the United States is correct, this appeal was improvidently noted and review here must be by writ of certiorari pursuant to 28 U.S.C. §1257(3), since the court of appeals sustained the constitutionality of the challenged statute. See 28 U.S.C. §§2103, 2111. We contend, however, that a local statute is now to be considered as a "statute of [a] state" within the meaning of the second subsection of §1257. If we are correct, this appeal was properly noted, since the court of appeals sustained the statute in the face of a claim of constitutional repugnance. There are several reasons which, we submit, compel the conclusion that Congress has treated local statutes as state statutes under the Court Reorganization Act, thus vesting this Court with appellate jurisdiction pursuant to 11 D.C. Code §102 (1971) and 28 U.S.C. §1257(2) in situations where, as here, the District of Columbia Court of Appeals has rejected a claim that a local statute is repugnant to the Constitution.

First, in reorganizing the courts in the District of Columbia, Congress chose to differentiate between "local" and "national" laws. The entire thrust of reorganization was to create a dual system of courts in the District of Columbia akin to the state-federal court systems existing in the several states. S. Rep. No. 405, 91st Cong., 1st Sess., at 5, 18, 19 (1969); H.R. Rep. No. 907, 91st Cong., 2d Sess., at 33-35, 45 (1970). In the reorganized court system, cases arising under "local" laws are principally to be heard and determined by the Superior Court of the District of Columbia, the "local"

court of general jurisdiction.[15] Appellate review of final judgments entered by the Superior Court is in the District of Columbia Court of Appeals, the "local" appellate court whose final judgments are subject to review in this Court "in accordance with" 28 U.S.C. §1257. 11 D.C. Code §102 (1971). Given the "national"-"local" division of jurisdiction among the courts in the District of Columbia, Congress' determination to pattern the mode of Supreme Court review of "local" appellate court decisions upon the state court model provided by 28 U.S.C. §1257 rather than the pattern provided by 28 U.S.C. §1254 governing review from the circuit courts reveals an intention to pattern the reorganized court system along "state"-"federal" lines. See S. Rep. No. 405, 91st Cong., 1st Sess., at 18 (1969); H.R. Rep. No. 907, 91st Cong., 2d Sess., at 33-35 (1970). To implement the mode of review which Congress provided, it is necessary to treat "local" statutes in the same manner as are statutes of the several states for purposes of invoking this Court's appellate jurisdiction.

Second, Congress clearly contemplated that some sort of review by appeal would be available to litigants seeking review of final judgments of the District of Columbia Court of Appeals. The express and unlimited employment of 28 U.S.C. §1257 rather than, for example, a limited use of §1257(3) makes this uncontestably clear,

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[15] While 11 D.C. Code §923(b)(1) (1971) purports to vest the Superior Court with "jurisdiction of any criminal case under any law applicable exclusively to the District of Columbia," that court does not exercise exclusive original jurisdiction over such matters. The United States District Court is given jurisdiction to hear and determine such matters when "joined in the same information or indictment with any Federal offense." 11 D.C. Code §502(3) (1971).

since Congress has evidenced an ability to exclude review by appeal when it desires to do so. *E.g.*, 28 U.S.C. §§1255 (Court of Claims review by certiorari or certification); 1256 (Court of Customs and Patent Appeals by certiorari). Since Congress did not exclude §1257(2) from its jurisdictional statute, the construction for which we contend not only accords with the Congressional purpose underlying the reorganization legislation but is the only construction which gives full meaning to what Congress provided in 11 D.C. Code §102 (1971).

Third, this Court's holding in *Balzac v. Porto Rico*, 258 U.S. 298, firmly supports the statutory construction for which we contend. Here, as was the case in *Balzac*, Congress has provided that final judgments of the highest "local" court are to be reviewed by this Court in the same manner as are the final judgments of state courts. *Compare* 22 D.C. Code §102 (1970) *with* Act of January 28, 1915, ch. 22, §2, 38 Stat. 803. Now, as was true when *Balzac* was decided, the Congressional statute regulating the mode of Supreme Court review of state court judgments provides that an appeal lies from the final decision of the highest state court where was drawn into question the validity of a statute of a state on the ground of repugnance to the federal Constitution. *Compare* 28 U.S.C. §1257(2) *with* Act of September 6, 1916, ch. 448, §2, 39 Stat. 726. In *Balzac*, this Court construed such a statutory scheme to authorize review by writ of error, not certiorari, where the Supreme Court of Puerto Rico had sustained a statute applicable exclusively to Puerto Rico[16] in the face of a federal constitutional

[16] In other contexts, statutes applicable exclusively to Puerto Rico are not state statutes. *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42, n. 1.

challenge. That case compellingly dictates a similar construction here, for the Government has shown no new or extraordinary circumstances that would justify suddenly uprooting a statutory construction that has been undisturbed for fifty years and which has been accepted by the Congress.[17]

For these reasons, we submit that a statute of "local" applicability is to be deemed a "statute of [a] state" within the meaning of 28 U.S.C. §1257(2), as that section is made applicable to review in this Court of final judgments of the District of Columbia Court of Appeals by 11 D.C. Code §102 (1971), and that this Court's appellate jurisdiction has accordingly been properly invoked with respect to appellant's Article III claim.[18]

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[17] Congress has since enacted a separate statute for review in this Court of the final judgments of the Supreme Court of Puerto Rico, but it has not departed from the *Balzac* holding. See 28 U.S.C. §1258(2) authorizing review by appeal "where is drawn into question the validity of a statute of the Commonwealth of Puerto Rico on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity."

[18] *Cleary v. District of Columbia*, 406 U.S. 914, is not to the contrary. In that case, an appeal was taken from a judgment of the District of Columbia Court of Appeals which affirmed a conviction for violation of a local disorderly congregation statute, 22 D.C. Code §1107. In the court of appeals, however, Cleary made no claim that the local statute was repugnant to the Constitution. Instead, he argued only that the evidence did not support his conviction and that the trial judge had erroneously applied the reasonable doubt standard to the evidence presented to him. See Brief for Appellant, *Cleary v. District of Columbia*, No. 5916 (D.C.C.A.) at 1. This Court held that it had no jurisdiction to entertain Cleary's appeal, and, treating Cleary's jurisdictional statement as a petition for writ of certiorari, see 28 U.S.C. §§2103, 2111, the Court denied the petition. 406 U.S. 914. Here,

That being so, appellant's additional Fourth Amendment claim, while independently incapable of sustaining an appeal, is properly here. *Prudential Insurance Co. v. Cheek*, 259 U.S. 530, 547; *Mishkin v. New York*, 383 U.S. 502, 512-513.

II

APPELLANT WAS ENTITLED TO HAVE HIS CASE HEARD AND DETERMINED BY AN ARTICLE III COURT

Appellant stood trial on a felony indictment returned in the name of the United States of America and charging him with violation of an Act of Congress applicable exclusively to the District of Columbia. If convicted, appellant faced imprisonment for up to ten years.[19] Despite his timely objection, appellant was tried, convicted and sentenced by a court not ordained and established in accordance with Article III of the Constitution and presided over by a judge holding office for a fixed term of years whose salary is not protected from diminishment during his continuance in office and who is subject to removal from office by a process other

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unlike *Cleary*, appellant has directly attacked the constitutionality of a local statute at all stages of the proceeding. It is the unsuccessful assertion of a claim that a local statute is repugnant to the Constitution, not the fact that a prosecution was instituted under a local statute, as was the case in *Cleary*, that gives rise to a right of appeal under 28 U.S.C. §1257(2).

[19] In fact, appellant received a sentence of imprisonment for not less than two years nor more than six years. Service of the sentence was suspended, except for six months, on condition of six years probation (A. 50).

than impeachment by the House of Representatives and conviction by the Senate. This, we contend, was serious constitutional error.[20]

Our argument proceeds as follows: (1) a felony prosecution involving violation of an Act of Congress

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[20]The Government has suggested that appellant lacks standing to challenge the constitutional status of the court which imposed sentence upon him (Motion to Dismiss at 6 n. 4). That contention, raised in neither the trial court nor the court of appeals, must be rejected. The safeguards afforded to federal judges under Article III are designed, not so much to protect judges as to make them independent, thereby guaranteeing to the litigants before them a judgment uninfluenced, either consciously or unconsciously, by the clamor of day-to-day issues of the intimidating influence of other branches of government. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17; *Evans v. Gore*, 253 U.S. 245, 253; *O'Donoghue v. United States*, 289 U.S. 516, 532-534; *cf. United States v. Brewster*, 408 U.S. 501, 507. As Congress put it in providing for lifetime tenure for the federal judges in Puerto Rico:

> "... Federal litigants in Puerto Rico should not be denied the benefit of judges made independent by life tenure from the pressures of those who might influence his chances of reappointment, which benefits the Constitution guarantees to the litigants in all other Federal courts." H.R. Rep. No. 135, 89th Cong., 1st Sess. at 2 (1965); S. Rep. No. 1504, 89th Cong., 2d Sess. at 2 (1966).

This is the "benefit" which appellant timely demanded in the courts below, and which he seeks to obtain here. He obviously has standing to claim the very benefit which Article III was designed to confer. *E.g., Glidden Co. v. Zdanok*, 370 U.S. 530, 533, 536 (opinion of Harlan, J.); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 15-17; *United States v. Montanez*, 226 F. Supp. 593 (S.D. N.Y. 1964), *aff'd*, 371 F.2d 79 (2 Cir. 1967); *Benitez Suarez v. United States*, 328 F.2d 473 (1 Cir. 1964); *United States v. Allocco*, 305 F.2d 704 (2 Cir.), *cert. denied*, 352 U.S. 931 (1956); Note, *Legislative and Constitutional Courts: What Lurks Ahead for Bifurcation*, 71 Yale L.J. 979, 1005-1012 (1962).

applicable exclusively to the District of Columbia is a case "arising under . . . the Laws of the United States" within the meaning of Article III, §2 of the Constitution; (2) unlike other matters arising under the laws of the United States which permit of, but do not necessarily require, exercise of the judicial power of the United States for resolution, a felony prosecution brought by the United States of America can only be resolved by an exercise of judicial power; (3) the judicial power of the United States as defined in Article III, §2 can only be exercised by a court ordained and established in accordance with the provisions of Article III, §1; and (4) the provisions of Article I, §8, cl. 17 do not afford a basis for disregard of these principles in the District of Columbia. We address these points *seriatim*.

A. Appellant's Case Arose Under the Laws of the United States

An Act of Congress, albeit one enacted pursuant to Article I, §8, cl. 17 of the Constitution, is a "law of the United States" within the meaning of Article III, §1 of the Constitution. *E.g., United States v. National Association of Real Estate Boards*, 339 U.S. 485, 488; *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 432-435; *Metropolitan Railroad Co. v. District of Columbia*, 132 U.S. 1, 9; *Cohens v. Virginia*, 6 Wheat. 264, 424-429; *United States v. More*, 3 Cranch 159 (C.C. D.C.) (Marshall, C.J. and Cranch, C.J.), *error dismissed*, 3 Cranch 159 (1805); *United States v. Cella*, 37 App. D.C. 433, 435 (1911); *United States v. Williams*, Fed. Cas. No. 16,712, 4 D.C. 372, 377, 392, 396 (1833) (Cranch, C.J.); *cf. United States v. Vuitch*, 402 U.S. 62, 64-67; *Shapiro v. Thompson*, 394 U.S. 618, 625 n. 4. This proposition is not only abundantly clear from the plain words of Article

III itself,[21] but is firmly established by this Court's historical exercise of its appellate jurisdiction with respect to "local" District of Columbia statutes.

It is axiomatic that this Court cannot constitutionally exercise its appellate jurisdiction except in those cases embraced by Article III's definition of the judicial power. *E.g., Martin v. Hunter's Lessee,* 1 Wheat. 304, 337; *Ex parte Yerger,* 8 Wall. 85, 98; *The Francis Wright,* 105 U.S. 381, 385. Thus, as Mr. Justice Johnson long ago pointed out, this Court's appellate jurisdiction with respect to cases and controversies coming to it from the District of Columbia "can be maintained only on the ground that the laws of that district are the laws of the United States . . . ." *American Insurance Co. v. Canter,* 1 Pet. 514 n. (a), 523 (C.C. S.C.), *aff'd,* 1 Pet. 511 (1828). It is only because laws applicable exclusively to the District of Columbia are "laws of the United States" that this Court properly exercised appellate jurisdiction in cases such as *General Motors Corp. v. District of Columbia,* 380 U.S. 553 (construction of "local" tax statutes); *Kent v. United States,* 383 U.S. 541 (construction of "local" juvenile court statute); *Fisher v. United States,* 328 U.S. 463 (construction of "local" murder statute); *Mason v. Fearson,* 9 How. 248 (construction of "local" tax sale statute); *Corporation of Washington v. Pratt,* 8 Wheat. 680 (construction of "local" municipal incorporation statute). Precisely the

[21] During the Constitutional Convention, Charles Pinckney, discussing a draft of Article III, asserted that "law of the United States" referred to "any of the regulations of Congress in pursuance of their powers. . . ." 3 Records of the Federal Convention 106, 117 (Farrand ed. 1966). See generally, II Story, *Commentaries on the Constitution* §§1228-1235 (4th ed. 1873).

same Article III reason justifies exercise of this Court's appellate jurisdiction in cases coming from state courts involving a "local" statute. *E.g., Ancient Egyptian Order v. Michaux*, 279 U.S. 737; *Creswill v. Knights of Pythias*, 225 U.S. 246; *cf. Mayor & Aldermen v. Eslava*, 16 Pet. 234.

B. Disposition of Appellant's Case Required Exercise of the Judicial Power of the United States

That appellant's case arose under the laws of the United States within the meaning of Article III, § 2 of the Constitution does not necessarily mean that disposition of his case required an exercise of the judicial power of the United States conferred upon this Court and the inferior federal courts by Article III, § 1. This Court has repeatedly made it clear that many matters are capable of, but do not necessarily require, exercise of the judicial power of the United States for disposition, *E.g., Glidden Co. v. Zdanok*, 370 U.S. 530, 549-550 (opinion of Harlan, J.); *Crowell v. Benson*, 285 U.S. 22, 50; *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. 272, 280, 284. Among such matters are money claims against the United States,[22] patent claims,[23] claims under the customs and revenue laws,[24] claims involving

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[22] Compare *Glidden Co. v. Zdanok*, 370 U.S. 530, 549-558 (opinion of Harlan, J.) with *Williams v. United States*, 289 U.S. 553.

[23] *Glidden Co. v. Zdanok*, 370 U.S. 530, 549-552, 558-561; *Brenner v. Mason*, 383 U.S. 519, 523-527.

[24] Compare *Glidden Co. v. Zdanok*, 370 U.S. 530, with *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716.

membership in Indian tribes[25] and the like.[26] These kinds of matters, being susceptible of disposition by exercise of legislative or executive power, do not necessarily require exercise of the judicial power of the United States. *Glidden Co. v. Zdanok*, 370 U.S. 530, 549-551 (opinion of Harlan, J.), 590-591 (Douglas, J., dissenting). Sometimes legislative power is directly applied to such matters.[27] On other occasions, special tribunals utilizing the judicial process, but not exercising the judicial power, have been created to deal with such matters.[28] On still other occasions, Congress has elected

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[25] *Wallace v. Adams*, 204 U.S. 415.

[26] Compare *United States v. Coe*, 155 U.S. 76 with 2 Records of the Federal Convention 466 (Farrand ed., 1966).

[27] A private bill is the classic example.

[28] The term "legislative court" has frequently been applied to such tribunals, and it is perhaps unfortunate that that particular term was coined. As Mr. Justice Harlan has observed , "the distinction referred to in [the] cases between 'constitutional' and 'legislative' courts has been productive of much confusion and controversy." *Glidden Co. v. Zdanok*, 370 U.S. 530, 534. The confusion is readily evident in the many efforts which have been made to clarify the distinction. See, *e.g.*, Watson, *The Concept of the Legislative Court - A Constitutional Fiction*, 10 Geo. Wash. L. Rev. 799 (1942); Katz, *Federal Legislative Courts*, 43 Harv. L. Rev. 894 (1930); Note, *Legislative and Constitutional Courts: What Lurks Ahead for Bifurcation*, 71 Yale L.J. 979 (1962); Note, *The Distinction Between Legislative and Constitutional Courts and its Effect on Judicial Assignment*, 62 Colum. L. Rev. 133 (1962). If by "legislative court" one means a tribunal utilizing the judicial process but not ordained and established in accordance with Article III of the Constitution, there are, in fact, two distinct types of "legislative courts." On the one hand, there are those tribunals dealing with matters not necessarily requiring exercise of the judicial power of the United States while, on the other hand, there are the territorial courts which have historically dealt with matters

to commit such matters to an "inferior court" ordained and established pursuant to, and exercising the judicial power conferred by Article III. *Glidden Co. v. Zdanok*, 370 U.S. 530. Whatever the outer reach of the permissible use of legislative or executive power in that kind of matter which permits of, but does not require, disposition by exercise of the judicial power, it cannot seriously be maintained that a general felony prosecution, such as in issue here, is capable of either legislative[29] or

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which, at least if adjudicated in the permanent portions of the Union, require exercise of the judicial power. See *Glidden Co. v. Zdanok*, 370 U.S. 530, 542-548, 550-552 (opinion of Harlan, J.); Harris, *The Judicial Power of the United States* 184-186 (1940). Since the essential inquiry is not the name of the tribunal, but the nature of the power it is exercising, *Ex parte Bakelite Corp.*, 279 U.S. 438, 451, 453; *Williams v. United States*, 289 U.S. 553, 578, we temporarily put to one side the territorial courts, see *infra*, pp. 36-39, and refer at this point only to the former category of "legislative courts," *i.e.*, those exercising non-judicial power in the disposition of matters not requiring exercise of judicial power. *Williams v. United States, supra*, 289 U.S. at 579, 581.

[29] Article I, §9, cl. 3 of the Constitution expressly forbids exercise of the legislative power to enact bills of attainder. This prohibition extends to bills of pains and penalties. *United States v. Lovett*, 328 U.S. 303, 315; *Ex parte Garland*, 4 Wall. 333; *Cummings v. Missouri*, 4 Wall. 277; *Drehman v. Stifle*, 8 Wall. 595, 601. That, as a general proposition, legislative power cannot be used to adjudicate guilt or impose a punishment in a criminal prosecution is clear, not only from the prohibition against enactment of bills of attainder, but also the express limitation on the legislature's impeachment power. Although impeachment will lie in the case of "treason, bribery, or other high crimes and misdemeanors" (U.S. Const. art. II, §4), the legislative judgment "shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States . . ." (U.S. Const. art. I, §3, cl. 7). To be sure, the legislature is empowered to punish its members for lack of attendance and "disorderly behavior" (U.S. Const. art. I,

executive[30] determination. This class of case involves only and exclusively exercise of the judicial power of the United States as defined in Article III of the Constitution. *Wong Wing v. United States*, 163 U.S. 228; *cf. Interstate Commerce Commission v. Brimson*, 154 U.S. 447.

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§5, cl. 1, 2). *In re Chapman*, 166 U.S. 661. Whatever the reach of that power, and whatever constitutional restraints may be applicable to such a proceeding, it is clear that the power being exercised is legislative power expressly conferred upon the Congress by the Constitution. See generally, *United States v. Brewster*, 408 U.S. 501, 519-520; *Powell v. McCormack*, 395 U.S. 486; *United States v. Johnson*, 383 U.S. 169; *United States v. Brewster*, 408 U.S. 501, 543-544 (Brennan, J., dissenting), 551-552 (White, J., dissenting). Legislative power also permits imposition of punishment upon the non-member who commits a contempt before Congress. *Barry v. United States ex rel. Cunningham*, 279 U.S. 597; *Anderson v. Dunn*, 6 Wheat. 204; cf. *McGrain v. Daugherty*, 273 U.S. 135. The legislative power to inflict punishment upon a non-member is a narrow one expressly limited to the "right to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty . . . ." *Marshall v. Gordon*, 243 U.S. 521, 542. Obviously, there are no such justifications for exercise of legislative power in this case.

[30]See *Reid v. Covert*, 354 U.S. 1, 38-39 (opinion of Black, J.); *Interstate Commerce Commission v. Brimson*, 154 U.S. 447. As is true with the legislative power, there are some very narrow exceptions. Trial by court martial involves, not the judicial power, but the executive's power as commander-in-chief (U.S. Const. art. II, §2, cl. 1) and perhaps the legislative power with respect to the armed forces (U.S. Const. art. I, §8, cl. 13, 14, 16). *Dynes v. Hoover*, 20 How. 65, 79. See *Kahn v. Anderson*, 255 U.S. 1, 6-7; *Ex parte Reed*, 100 U.S. 13, 21. The President's power as commander-in-chief permits him to establish an executive tribunal to hear and determine a criminal charge brought against an enemy alien in time of war. *Ex parte Quirin*, 317 U.S. 1. See *In re Yamashita*, 327 U.S. 1. By the same token, there is a narrow class

C. Only A Court "Ordained and Established" In Accordance With Article III Can Exercise The Judicial Power of the United States.

While it is true that one cannot demand a constitutional court in a case "equally susceptible of legislative or executive determination,"[31] we think that one is necessarily entitled to such a court in a case not susceptible of legislative or executive determination. This follows, we submit, not only from the unambiguous command of Article III that the judicial power of the United States "shall" be vested in this Court and the "inferior courts" ordained and established in accordance with that article's requirements, but also from this Court's determination that a tribunal which is not so ordained and established is "incapable" of exercising the judicial power of the United States as defined in Article III. *Williams v. United States*, 289 U.S. 553, 565; *American Insurance Co. v. Canter*, 1 Pet. 511, 546. While willing to assume that disposition of local felony cases in the District of Columbia could only involve an exercise of judicial power, the court of appeals found a "species" of judicial power "wholly separate and apart" from Article

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of cases where executive power may be exercised to hear and determine a criminal charge brought against a civilian in occupied territory following the cessation of hostilities. *Madsen v. Kinsella*, 343 U.S. 341. See *Mechanics' and Traders' Bank v. Union Bank*, 22 Wall. 276; *The Grapeshot*, 9 Wall. 129; *cf. Santiago v. Nogueras*, 214 U.S. 260; *Neely v. Henkel*, 180 U.S. 109. As is true with the limited use of legislative power to impose punishments, this power is a narrow one and extends just far enough to permit the President to discharge his constitutional duties as commander-in-chief. See *Reid v. Covert*, 354 U.S. 1; *United States ex rel. Toth v. Quarles*, 350 U.S. 11; *Ex parte Milligan*, 4 Wall. 2.

[31] *Williams v. United States*, 289 U.S. 553, 579.

III which it held Congress could vest "upon District courts free of the limitations contained in Article III ...." 290 A.2d at 577, 578; A. 55-56. We thus turn to an examination of the unique status of the District of Columbia and demonstrate that nothing in Article I, §8, cl. 17 permits Congress to disregard the limitations of Article III when it "ordains and establishes" courts in the District of Columbia to exercise Article III's judicial power.

D. When Vesting the Judicial Power of the United States in Courts in the District of Columbia, Congress Is Subject to the Limitations of Article III.

The plenary legislative power of Congress with respect to the District of Columbia is well established. Article I, §8, cl. 17 gives Congress the power of "exclusive legislation" with respect to the District of Columbia. That grant of legislative power is amply sufficient to enable Congress to pass laws applicable to the District of Columbia without resort to any other provision of Article I. Compare 22 D.C. Code §3204, the statute under which appellant stood trial, with *United States v. Bass*, 404 U.S. 336. That plenary grant of legislative power permits Congress to establish the method by which the District of Columbia will be governed, and to alter the form of the local government from time to time. See *District of Columbia v. Thompson Co.*, 346 U.S. 100, 104-110. But to say that the legislative power of Congress with respect to the District of Columbia is plenary does not mean that exercise of that power is free of the restraint imposed by other provisions of the Constitution. This Court has repeatedly held otherwise. *District of Columbia v. Thompson Co.*, 346 U.S. 100, 109; *O'Donoghue v. United States*, 289 U.S. 516, 545; *Downes v. Bidwell*,

182 U.S. 244, 260-261; *Callan v. Wilson*, 127 U.S. 540, 550. Thus, Congress may not dispense with the right to indictment by a grand jury for a local criminal offense in the District of Columbia. *United States v. Moreland*, 258 U.S. 433. Neither may Congress deprive a defendant charged with a local criminal offense the right to a jury trial pursuant to Article III of the Constitution. *District of Columbia v. Colts*, 282 U.S. 63, 74; *Callan v. Wilson*, 127 U.S. 540.[32] Nor, we submit, under the holding of *O'Donoghue v. United States*, 289 U.S. 516, may Congress deprive a defendant charged with a local felony offense the right to have his case heard and determined by a court ordained and established in accordance with Article III.

While we think that *O'Donoghue v. United States, supra*, authoritatively disposes of the contrary holding by the court of appeals,[33] we address separately the power

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[32]With respect to a local civil action, Congress may not deprive the litigants of the right to a trial by jury in accordance with the Seventh Amendment. *Capital Traction Co. v. Hof*, 174 U.S. 1.

[33]The court of appeals sought to distinguish *O'Donoghue* by surmising that Mr. Justice Sutherland must have intended to refer only to that portion of the jurisdiction of the federal courts in the District of Columbia as was parallel "with the other inferior *federal* courts in the several states." 290 A.2d at 579, n. 15; A. 59 n. 15). There is nothing in *O'Donoghue* that even remotely suggests that such a distinction was intended. Indeed, in view of Mr. Chief Justice Hughes' dissent, which relied heavily upon the plenary powers of Congress with respect to the District of Columbia, it is unlikely that the distinction which the court of appeals strained to draw would have been allowed to go without comment. Moreover, it must be assumed that this Court was generally familiar with the workloads of the federal courts at the time it wrote its opinion in *O'Donoghue*. During fiscal year 1933, the Supreme Court of the District of Columbia had filed with it 7,275 criminal cases and 4,798 civil actions. Annual Report of the Attorney General 146 (1933). No other federal court approached that caseload, no doubt

of Congress to establish courts in the District of Columbia and the territorial courts since both those matters received extensive treatment in the opinion of the court of appeals (290 A.2d at 576-580; A. 55-61). We then address as a separate proposition the contention that Congress is free of the commands of Article III when it established courts to exercise the judicial power of the United States in the District of Columbia.

1. *The Power of Congress To Establish Courts in the District of Columbia*

In concluding that Article I, §8, cl. 17 permits Congress to "confer a 'judicial power' wholly separate and apart from its authority under article III" in courts in the District of Columbia (290 A.2d at 577; A. 55), the court of appeals confused two distinct and separate principles. The first is that Congress may vest in Article III courts sitting in the District of Columbia powers that it has not[34] or perhaps could not[35] vest in Article III courts

due to the "local" jurisdiction exercised by the Supreme Court of the District of Columbia. The kinds of criminal prosecutions brought then in the District of Columbia courts were, as they continue to be, predominantly "local." Annual Report of the Attorney General 163-165 (1931). With all respect to the court of appeals, the distinction it purported to see in *O'Donoghue* between "local" and "federal" jurisdiction is simply not there.

[34] *Kendall v. United States*, 12 Pet. 524, merely held that the Circuit Court of the District of Columbia, an Article III court, had jurisdiction to issue a writ of mandamus pursuant to Sections 3 and 5 of the Organic Act of 1801, 2 Stat. 103, directed to the Postmaster General of the United States and commanding him to obey a private Act of Congress and perform a mandatory duty which he owed to the plaintiffs. There is nothing in Article III which would have then precluded Congress from conferring such a power upon all Article III courts as it has since done by 28 U.S.C. §1361.

[35] The court of appeals properly did not rely on the so-called hybrid jurisdiction cases. See, *e.g.*, *Federal Radio Commission v.*

sitting in the several states. That principle has no bearing on a case such as this which, as we have shown, *supra*, pp. 24-27, involves exercise of Article III's judicial power.[36] The issue here is not whether an Article III court, either in the District of Columbia or elsewhere[37]

General Electric Co., 281 U.S. 464; *Keller v. Potomac Elec. Power Co.*, 261 U.S. 428, 442-443. Those cases hold that Congress, in the exercise of its plenary power over the District of Columbia, may vest in Article III courts sitting in the District of Columbia administrative or legislative powers. Arguably, Article III courts and officers not sitting in the District of Columbia would be precluded from exercise of such powers. *But see National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 583-604 (opinion of Jackson, J.). But even on the assumption that such powers could not be vested in Article III courts sitting outside the District of Columbia, those cases cannot support an argument that Congress may vest Article III's judicial power in an administrative or legislative tribunal. *Glidden Co. v. Zdanok*, 370 U.S. 530, 580 n. 53 (opinion of Harlan, J.), 590 n. 1 (opinion of Douglas, J., dissenting); *O'Donoghue v. United States*, 289 U.S. 516, 547-548. Moreover, as Mr. Justice Harlan has observed, the powers held to be administrative or legislative in *Radio Commission* and *Keller* "[have] long since been transformed into judicial business." *Glidden Co. v. Zdanok*, *supra*, 370 U.S. at 580 n. 53. This case does not call for reexamination of the question as to whether Congress may vest such administrative or legislative functions in Article III courts sitting in the District of Columbia.

[36] In *Lurk v. United States*, 111 U.S. App. D.C. 238, 296 F.2d 360 (1961) (en banc), *aff'd on other grounds sub nom. Glidden Co. v. Zdanok*, 370 U.S. 530, the court of appeals held that a trial for a local felony in the District of Columbia does not require an Article III court. This Court expressly reserved judgment on that issue, 370 U.S. at 537.

[37] *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, holds that Article III courts in the several states may exercise diversity jurisdiction in suits between a citizen of a state and a citizen of the District of Columbia.

may exercise a non-Article III power, but whether a non-Article III court may be empowered to exercise Article III's judicial power. Compare *Glidden Co. v. Zdanok*, 370 U.S. 530, 580 N. 53 (opinion of Harlan, J.), 590 n. 1 (opinion of Douglas, J., dissenting); *O'Donoghue v. United States*, 289 U.S. 516, 547-548.

Second, relying on the historical fact that non-Article III officers[38] have always exercised jurisdiction over minor criminal offenses within the District of Columbia, the court of appeals concluded that Congress is free of the limitations of Article III when it vests courts in the District of Columbia with the judicial power of the United States. The court of appeals missed the point, for neither this Court nor any other has ever held that only the judicial power of the United States may be exercised in the hearing and determination of a minor criminal offense, and there is substantial historical support for the proposition that these offenses have involved, not exercise of the judicial power, but instead legislative, police and municipal power.

That Congress was early aware of the distinction between judicial power and legislative power is clear from careful analysis of the way by which it distributed jurisdiction over criminal cases in the District of Columbia.[39] From 1801,[40] until the challenged statute

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[38] *But see United States v. More*, 3 Cranch 159 (C.C.D.C. 1805) (Marshall, C.J. and Cranch, C.J.), error dismissed, 3 Cranch 159.

[39] This early practice by Congress is persuasive evidence of the meaning of Article III. *E.g., Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 279-280.

[40] Prior to this time, Maryland and Virginia continued to exercise sovereignty over the District of Columbia pursuant to the express provision in the Act of July 16, 1790, ch. 28, §1, 1 Stat. 130. See *United States v. Hammond*, 1 D.C. 15 (1801); *United States v. Heinegan*, 1 D.C. 50 (1802).

took effect in 1971, Congress provided that jurisdiction to hear and determine felony cases was exclusively committed to courts ordained and established in accordance with Article III.[41] Simultaneously, Congress

[41]The Organic Act of 1801, 2 Stat. 103, provided that the Circuit Court for the District of Columbia, whose judges held office "during good behavior" would exercise the same jurisdiction as did the circuit courts in the several states. Act of February 27, 1801, ch. 15, §3, 2 Stat. 103. A year later, the District Court, the judges of which also held office during "good behavior", assumed such jurisdiction. Act of April 29, 1802, ch. 31, §24, 2 Stat. 156. Thereafter, in 1838, Congress transferred such jurisdiction to the Criminal Court of the District of Columbia. Act of July 7, 1838, ch. 192, §1, 5 Stat. 306. From the fact that the statute provided no term of office for the judge, the court of appeals concluded that the Criminal Court was not an Article III court (290 A.2d at 576 n. 7; A. 00). The court drew the wrong conclusion. Not only does the absence of a specific term of office support the conclusion that the Criminal Court was a constitutional court, examination of the commissions issued to the judges of that court conclusively demonstrate that the President and the Congress treated that court as a constitutional court. On December 27, 1838, President Van Buren appointed James Dunlop to serve as a judge of that court "during his good behavior." When Judge Dunlop resigned in 1845, see 1 Hayw. & H. v. (1907), a recess appointment was issued to Thomas H. Crawford "until the end of the next session of the Senate of the United States and no longer." Thereafter, Judge Crawford was appointed to the constitutional "good behavior" term of office. General Records of the Department of State, Record Group 59, Judge's Commissions, vol. 1, National Archives of the United States. (Included in the original commissions issued to judges of the Criminal Court is a commission issued by President Van Buren to Thomas F. Mason on July 7, 1838. That commission does not specify a term of office, either by reference to a period of years or to the constitutional term of "good behavior." We have been unable to ascertain whether Mr. Mason ever assumed office and, if so, how long he served. Mr. Mason's commission, as filed with the National Archives, bears a hand written notation, "Martin Van Buren (dead)." Since President Van Buren remained in office until 1841 and was the president who signed Judge Dunlop's "good behavior" commission in December 1838, it is possible that Mr. Mason died before assuming office.)

provided that justices of the peace had jurisdiction to hear and determine minor criminal matters and impose punishments not exceeding one year in jail.[42] The powers vested in the early justices of the peace, and later in the Police Court for the District of Columbia,[43] were thought by Congress to involve "general administrative, police, and legislative powers." These matters did not involve exercise of the judicial power of the United States,[44] and both this Court and the District of Columbia courts always referred to such jurisdiction as "petty"[45] or non "infamous".[46] Whether the line drawn by Congress at one

[42]The Organic Act of 1801 authorized justices of the peace to discharge the duties "civil and criminal" which had theretofore been exercised by the justices of the peace of Maryland and Virginia. Act of February 27, 1801, ch. 15, §11, 2 Stat. 103. In 1812, Congress delegated administrative, police and legislative powers to the local government of the District of Columbia defining such powers to include the right to punish by whipping (not exceeding forty stripes) or by jailing not exceeding one year of persons found guilty of certain offenses such as "begging or [being] drunk in or about the streets," "eavesdroppers and night walkers" and "public prostitutes." Act of May 4, 1812, ch. 74, §6, 2 Stat. 721. Subsequent statutes expanded the kinds of offenses which the local government was authorized to punish by jailing for not more than a year, but carefully defined such powers as "power and authority" of the "corporation." Act of May 15, 1820, ch. 104, §8, 3 Stat. 583; Act of May 17, 1848, ch.42, §14, 9 Stat. 223 ("violations of the police regulations and penal laws of the corporation").

[43]The Police Court assumed the jurisdiction of the local justices of the peace in 1870. Act of June 17, 1870, ch. 133, 16 Stat. 153.

[44]*Capital Traction Co. v. Hof*, 174 U.S. 1, 16-18, 45 (civil jurisdiction); *United States v. Mills*, 11 App. D.C. 500 (1897) (criminal jurisdiction).

[45]*United States v. Mills, supra*, 11 App. D.C. at 507 ("petty"); *Gassenheimer v. District of Columbia*, 6 App. D.C. 108, 115 (1895) ("petty").

[46]*Callan v. Wilson*, 127 U.S. 540, 556 (not "infamous" or "punishable by imprisonment in the penitentiary").

year in jail is the proper dividing line between those criminal matters which do not necessarily require exercise of the judicial power of the United States is a matter for another day.[47] It suffices for present purposes to note that this minor criminal jurisdiction, always regarded as outside the compulsory reach of Article III, affords no support for the proposition that Congress may disregard the command of Article III in cases concededly requiring exercise of the judicial power of the United States.

2. *The Territorial Court Cases Afford No Support for the Disregard of Article III in the District of Columbia.*

Recognizing that this Court's holding in *O'Donoghue v. United States*, 289 U.S. 516, authoritatively rejected

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[47] In accommodating the commands of the Constitution to the so-called minor or petty offense, each constitutional provision must be examined independently. Thus, for example, the right to counsel extends to all matters in which there is to be a punishment of incarceration. *Argersinger v. Hamlin*, 407 U.S. 25. Trial by jury in a criminal case is not required for "petty" offenses even though incarceration for a limited period of time may be imposed for such an offense. *Cheff v. Schnackenberg*, 384 U.S. 373; *District of Columbia v. Clawans*, 300 U.S. 617. An indictment is required for "infamous" crimes punishable by imprisonment in a penitentiary. *United States v. Moreland*, 258 U.S. 433. Whether a one year dividing line between cases which require exercise of judicial power, and those which merely permit of, but do not necessarily require, exercise of that power is proper is an issue for another day. It suffices for present purposes to note that Congress has treated that factor as the dividing line, not only in the District of Columbia, see *supra*, pp. 30-36, but in the several states. See 18 U.S.C. §3401 (1972) which authorizes a United States Commissioner, a non-Article III officer, to try "minor" offenses punishable by not more than one year incarceration. See also 23 D.C. Code §101(a) (1971).

an effort to justify disregard of Article III's limitations in the District of Columbia by resort to the territorial court cases, the court of appeals nevertheless suggested that local conditions might justify reexamination of the *O'Donoghue* holding (290 A.2d at 576 n. 5; A. 00). The court fundamentally missed the point. In the first place, this Court carefully reexamined the constitutional premises of *O'Donoghue* as late as *Glidden Co. v. Zdanok*, 370 U.S. 530, 536, 539, 542, 543, 548, 580 (opinion of Harlan, J.), 590 n. 1, 599, 605 (opinion of Douglas, J., dissenting), and reaffirmed those premises. In the second place, the fundamental premise of *O'Donoghue* is the different source of the "judicial power" being then exercised by the territorial courts. That is a problem which has vexed the Court from the time it first grappled with the territorial court cases in 1828. *American Insurance Co. v. Canter*, 1 Pet. 511, 545. What *Canter* held was that a territorial court, not being ordained and established in accordance with Article III of the Constitution, was "incapable" of receiving a grant of Article III's judicial power. What *Canter* did not decide, however, was the nature of the power being exercised by such courts. Over the years, several different theories have received support in the opinions of this Court. There are cases which hold that territorial courts indeed exercise judicial power, but that the source of that power is Article IV of the Constitution, not Article III.[48] There are other opinions which suggest that these courts always exercised the judicial power of the United States, but were exempt from the tenure limitations of that article

[48] *Williams v. United States*, 289 U.S. 545, 565-566; *O'Donoghue v. United States*, 289 U.S. 516, 535.

by virtue of the temporary status of the territories.[49] And there are opinions which suggest that these courts exercised only legislative power, not judicial power at all.[50] However this interesting debate be settled--and perhaps it is time to accede to Professor Wright's suggestion that "the dubiously conceived notion that courts of the United States can be other than 'constitutional' " be disavowed[51]--these cases have no bearing on the present case. Unlike the courts sitting in the territories, the federal courts in the District of Columbia sit in a constitutionally permanent part of the Union[52] and there is accordingly no local consideration, such as the temporary status of the territories, to justify a departure from the tenure provisions of Article III.

Moreover, aside from *O'Donoghue*, this Court has long recognized the significant difference between the constitutional courts in the District of Columbia and the territorial courts. While the territorial courts are not courts of the United States,[53] the courts of the District of

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[49] *Glidden Co. v. Zdanok*, 370 U.S. 530, 544 (opinion of Harlan, J.). Mr. Justice Harlan pointed out that acceptance of the Article IV theory requires transmogrification of Article IV "judicial power" into Article III judicial power when a case from the territorial courts reaches this Court. Disenchanted with the difficulties of justifying that position, Mr. Justice Harlan suggested that the territorial courts had always exercised Article III judicial power, but had been exempted from that article's tenure requirements due to the impermanent status of the territories.

[50] *Glidden Co. v. Zdanok*, 370 U.S. 539, 599 (dissenting opinion of Douglas, J.).

[51] Wright, *Federal Courts* §11 p. 34 (1971).

[52] See *O'Donoghue v. United States*, 289 U.S. 516.

[53] *E.g., Clinton v. Englebrecht*, 13 Wall. 434; *United States v. McMillan*, 165 U.S. 504.

Columbia are[54] and, like all Article III courts, judgments of the constitutional courts in the District of Columbia are federal judgments within the meaning of the Supremacy Clause of the Constituution.[55] Thus, however the status of the territorial courts is ultimately resolved—and under the holding of *O'Donoghue v. United States, supra,* that issue need not be revisited in this case—the practice in the territories is not justification for disregard of Article III in the District of Columbia.

3. *There Are No Valid District of Columbia Reasons To Override Article III Safeguards*

Each time this Court has been presented with a contention that a particular constitutional safeguard should be denied a litigant because of the unique status of the District of Columbia, the Court has carefully considered whether that constitutional right is so inconsistent with the plenary power of Congress over the District of Columbia that it must give way. *O'Donoghue v. United States,* 289 U.S. 516, 530-535, 538-540; *Downes v. Bidwell,* 182 U.S. 244, 260-261; *Callan v.*

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[54] *E.g., Federal Trade Commission v. Klesner,* 274 U.S. 145, 154; *Benson v. Henkle,* 198 U.S. 1, 13-15; *Cross v. United States,* 145 U.S. 571, 576.

[55] *Embry v. Palmer,* 107 U.S. 3. Similarly, it has long been settled that crimes committed in the District of Columbia are crimes against the United States. *Metropolitan R. Co. v. District of Columbia,* 132 U.S. 1; *Clemmer v. Alexander,* 111 U.S. App. D.C. 189, 295 F.2d 176 (1961); *Gilstrap v. Clemmer,* 284 F.2d 804 (4 Cir. 1960); *Vogel v. Wong,* 178 F.2d 327 (6 Cir. 1949); *Parker v. United States,* 3 F.2d 903 (9 Cir. 1925); *Easterday v. McCarthy,* 256 Fed. 651 (2 Cir. 1919); *Fletcher v. United States,* 42 App. D.C. 53 (1914); *Tyner v. United States,* 23 App. D.C. 53 (1904); *United States v. Manuel,* 126 F. Supp. 618 (D.D.C. 1955); *MacAboy v. Klecka,* 22 F. Supp. 960 (D. Md. 1938).

Wilson, 127 U.S. 540, 550. While it is, of course, unnecessary to reiterate in detail the historical reasons which support the very fundamental safeguards which Article III affords to judge and litigant alike,[56] it is important to observe that these safeguards are as important today as they were when the Constitution was adopted.[57] Moreover, far from there being anything about the District of Columbia that would warrant departure from Article III's command, the District of Columbia, with its geographical proximity to the Congress,[58] calls for those safeguards in a manner even more compelling than would be the case in the several states.[59] While we

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[56] *E.g.*, *The Federalist* Nos. 78, 79 (Lodge ed. 1888) at 489, 491-494; Madison, *Journal of the Federal Convention*, 614-615 (Scott ed., 1893); *O'Donoghue v. United States*, 289 U.S. 516, 530-534; *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17; *Evans v. Gore*, 253 U.S. 245, 253.

[57] See, *e.g.*, Metzger, *Why I Am No Longer A Judge*, 177 The Nation 52 (1953); Brown, *The Rent in Our Judicial Armor*, 10 Geo. Wash. L. Rev. 127 (1941). The whole matter of judicial independence was thoroughly aired recently before a committee of the Senate. See *The Independence of Federal Judges, Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970). See generally, Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes From History*, 36 U. Chi. L. Rev. 665 (1969).

[58] *O'Donoghue v. United States*, 289 U.S. 516, 538-544; Note, *Legislative and Constitutional Courts*, 71 Yale L.J. 979, 1010-1011 (1962); Note, *The Distinction Between Legislative and Constitutional Courts and its Effect on Judicial Assignment*, 62 Colum. L. Rev. 133, 154 n. 149 (1962).

[59] Judges of the local courts who do not enjoy constitutional independence have already been attacked on the floor of the Senate of the United States. *See* 117 Cong. Rec. 14611-14617 (92d Cong., 1st Sess., September 21, 1971) (remarks of Senator Byrd). What effect such attacks have on the local judges cannot, of

think *O'Donoghue v. United States*, 289 U.S. 516, is the authoritative answer to a contention that Article III safeguards are inapplicable to the District of Columbia, review of the legislative history of this statute shows that there is no District of Columbia reason that would warrant depriving litigants and judges in the nation's capital of Article III protections.

The legislative history of the District of Columbia Court Reform Act shows Congress determined to create the local court system as part of a comprehensive legislative assualt on a growing incidence of crime in the District of Columbia. Various reasons for this decision were advanced in the Committee reports.[60]

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course, be ascertained. What is known is that at least one of the local judges has already been subjected to formal disciplinary proceedings instituted by the District of Columbia Commission on Judicial Disabilities and Tenure. See 11 D.C. Code §§1521, *et seq.* (1971). *In re Alexander*, Formal Case No. 1-71 (1972).

[60]The House Committee on the District of Columbia thought a local court system would terminate the "anomaly" of having local matters heard and determined by the United States District Court and the United States Court of Appeals, eliminate the "chaos and confusion" thought to exist between the then-local and federal courts over the nature of certain criminal acts constituting either felonies or misdemeanors and reduce a "soaring crime rate" by providing "swift and sure justice" as a deterrent. H.R. Rep. No. 907, 91st Cong., 2d Sess. at 23, 25 (1970). Similar considerations were advanced by the Senate Committee on the District of Columbia which additionally thought that the establishment of a local court system would ease court congestion and case backlogs. S. Rep. No. 405, 91st Cong., 1st Sess. at 1-3 (1969).

Whether these reasons are good ones or not is, of course, wholly immaterial to the present case, for we readily concede that the power of Congress to "ordain and establish" courts inferior to the Supreme Court of the United States in accordance with Article III is plenary. Appellant's complaint is not that he was tried in a "local" court, but rather that he was tried in a "court" not ordained and established in accordance with Article III.

Although the proposals in the various court reorganization bills introduced in the House and Senate initially called for good behavior tenure (subject to retirement at age 70),[61] the final versions of neither house called for such tenure, and both houses included provisions for a commission with power to hear complaints concerning judicial disabilities and misconduct and to remove judges from office in appropriate cases.[62] The legislative history underlying these provisions shows that the principal concern—repeated time and time again by witnesses and Members of Congress alike and reflected in both the House and Senate Reports—was an alleged need to monitor judicial conduct during an incumbent's service on the bench. A few illustrations from the legislative history of the statute makes the point abundantly clear.

The Committee on the Administration of Justice, appointed in 1966, recommended passage of a bill which

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[61]The Senate proposal, S. 1214, 91st Cong., 1st Sess. at 3, would have provided for tenure during "good behavior subject to mandatory retirement at the age of seventy years." *Hearings on S. 1066 et al. Before the Senate Comm. on the District of Columbia and the Senate Subcom. of the Comm. on the Judiciary*, 91st Cong., 1st Sess., pt. 3, at 529 (hereinafter cited as "Senate Hearings"). A similar provision was included in Attorney General Mitchell's recommended legislation introduced as H.R. 13690 and H.R. 12855. *Hearings on H.R. 6034 et al. Before Subcomm. No. 1 of the House Comm. on the District of Columbia*, 91st Cong., 1st Sess., pt. I, at 2, 8-9 (hereinafter cited as "House Hearings").

[62]The final Senate version proposed a four-year "trial" term of office followed by good behavior tenure subject to retirement at age 70. S. Rep. at 8. The final House version, and the version which prevailed, called for ten-year terms of office. H. Rep. at 38. Both versions called for a commission empowered to hear complaints on judicial disabilities or misconduct and to remove judges from office under certain conditions. S. Rep. at 10-11; H. Rep. at 38.

would have combined a judicial nominating commission, a good behavior tenure (subject to retirement at age 70), and a second commission empowered to hear complaints about judges and to remove them from the bench if necessary. S.H. at 612-617. Mr. Ellison, chairman of that committee, explained that these proposals would "accord the local judiciary the same tenure as the federal bench" while "effectively minimiz[ing] any dangers inherent in good behavior tenure." S.H. at 615-616. He further testified that the proposed commission empowered to remove judges from office would "insure[] against the freezing of bad judges into office," "alleviate[] many of the problems involved in retiring a judge who has become disabled due to old age," and "increas[e] the judge's awareness that he must meet reasonable standards of competence and behavior in relation to his office." S.H. at 633. Senator Tydings asked Mr. Ellison to comment on the effect such a removal commission might have on judicial "independence." S.H. at 651. The record shows the following colloquy in response to the inquiry:

> "MR. ELLISON: I think their independence should be invaded in some cases, Mr. Chairman.
>
> "I think that if they live up to their obligations they have nothing to fear. But I think the public does need some protection against some of the judges who are not really competent to handle their job. It is too bad that this offends some men who are not being considered at all in this matter.
>
> "But I think it is one way to correct some of the minor cases, and there are not very many of them, that ought to be taken care of. There may be others here who have something to add to that.
>
> "THE CHAIRMAN [Senator Tydings]: I just wanted to get a statement in the record.

"MR. ELLISON: It does not disturb me very much because I think these judges need to be under some—

"THE CHAIRMAN: Certainly in those States which have the California system, and it has worked very well—

"MR. ELLISON: Very well.

"THE CHAIRMAN (continuing): It has protected the integrity of the bench. It has given the public greater confidence, and we hope we will have a chance of implementing your proposal here." S.H. at 652.[63]

Later in the hearings, Senator Tydings amplified his views on the proposed removal commission:

"The whole concept of a removal commission is not just the removal power, it is the idea of oversight and the responsibility of a judge to some higher authority for his good conduct. The advantage of the California system is that the judges realize they are now accountable and in many, many instances where there have been complaints filed by lawyers, the judges were called in and they knew they were under fire and they straightened up or retired." S.H. at 808.

A similar position was taken by then Deputy Attorney General Kleindienst, who testified that the removal commission would serve as "a constant check on the quality of judicial service." S.H. at 1152.

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[63] Immediately following this colloquy, Mr. Pickering, a member of Mr. Ellison's commission (S.H. at 587), made the astonishing admission that the committee had "not really studied or researched" the removal proposal from the standpoint of Article III's prohibitions. S.H. at 652.

The Senate Report makes it clear that these were the considerations that the Senate had in mind in passing a statute providing for removal of judges by means other than impeachment:

"In drafting the tenure provision of the amended bill, the committee was conscious both of the inexactness of the art of judicial selection and of the importance of tenure in attracting the most competent men to the bench. The committee recognized that the constitutional requirement of "good behavior" tenure has played a significant role in the historic high quality of the Federal bench. On the other hand, the committee was aware that virtually no State has provided such tenure for its judges, an apparent recognition that the opportunity to review the quality of a judge's performance also has its obvious advantages. The committee, therefore, sought a tenure provision that would combine the attractiveness of the federal system with the opportunity for some review of the judge's work.

* * *

"At present, the only means available to rid the local bench of a sick or venal judge is through the process of impeachment by the House of Representatives and trial by the U.S. Senate. To believe that the Congress at this time in our history has the time to police the local judiciary through the impeachment process is just not realistic. That process has not even proven viable when the conduct of Federal, good behavior tenure judges is drawn into question." S. Rep. at 8, 11.

In the House of Representatives, substantially the same considerations were voiced. House Hearings at 69-70, 195-196, 258, 268. The House Report states that the removal commission was "designed to provide a constant

check on the quality of judicial service" and "to remove judges who are found to be guilty of willful misconduct or persistent failure to work, or those who suffer from permanent physical or mental disability incapacitating them for judicial duties." H. Rep. at 38.

At the risk of belaboring the obvious, the reasons advanced by Congress in support of the establishment of non-Article III tribunals in the District of Columbia is dramatic evidence for the need of Article III's safeguards. *O'Donoghue v. United States*, 289 U.S. 516, 530-535. While the arguments advanced in the legislative history may be good reasons for a proposal to amend Article III, they afford no justification for disregard of those fundamental safeguards to judges and litigants in the District of Columbia.

Appellant was unconstitutionally deprived of his right under Article III to have his case heard and determined by a court ordained and established under that article.[64]

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[64] The specific issue raised by this appeal is whether a defendant who has made a pre-trial demand for an Article III court to hear and determine his case, and who has pursued that right at every stage of the direct appeal following conviction, is entitled to relief. There is no occasion to consider here whether a defendant who has acquiesced in a trial before a non-Article III officer, or who has not pursued denial of such a claimed right by appeal, is later able to attack a judgment long since final on Article III grounds. See *Ball v. United States*, 140 U.S. 118; *McDowell v. United States*, 159 U.S. 596, 601-602. *But cf. Glidden Co. v. Zdanok*, 370 U.S. 530. Cf. *Goss v. Mayden*, 450 F.2d 753 (5th Cir.), *cert. granted*, 407 U.S. 920; *Warner v. Flemings*, No. 71-1398 (Oct. T. 1972).

III.

THE EVIDENCE AGAINST APPELLANT WAS OBTAINED IN VIOLATION OF HIS FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEIZURES OF HIS PERSON

In overruling appellant's claim that he was unreasonably seized by police officers in violation of the Fourth Amendment, the court of appeals has held that an officer in the District of Columbia need observe no violation of law nor articulate any reason before he forces a motorist to pull his automobile to the curb and produce for the officer's inspection a driver's permit and motor vehicle registration certificate. If, during the course of such a forcible, selective stop, the officer observes evidence of a crime in "plain view," the court of appeals has held that he may seize that evidence and use it to obtain the motorist's conviction over timely Fourth Amendment objection. We contend that the selective, forcible "spot check" conducted in this case violated appellant's Fourth Amendment protection against unreasonable seizures because: (1) any seizure of an individual made without at least an articulable suspicion of criminal behavior is "unreasonable" under the Fourth Amendment; and (2) the seizure here cannot be sustained on "health and safety" grounds since (a) this was not a "health and safety" seizure at all and (b) even if it were, the Fourth Amendment requires that all selective intrusions, even so-called "health and safety" ones, be subject to minimum "articulable suspicion" standards.[65]

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[65] Since no one can contend that police officers may stop traffic solely to get a "plain view" of "everything that might be inside the car" (A. 37), the court of appeals properly held that the lawfulness of the seizure of the evidence turns on the lawfulness of the seizure of appellant. 290 A.2d at 583-584; A. 66. See *Harris v. United States*, 390 U.S. 234, 236.

A. Appellant Was "Seized" in Violation of the Fourth Amendment

The Fourth Amendment provides protection not only against unreasonable searches but also unreasonable "seizures."[46] *Terry v. Ohio*, 392 U.S. 1; *Davis v. Mississippi*, 394 U.S. 721; *Adams v. Williams*, 407 U.S. 143. A seizure is unreasonable under the Fourth Amendment unless, at a minimum, the police have "specific and articulable facts which, taken together with rational inferences from those facts, warrant that intrusion." *Terry v. Ohio*, *supra*, 392 U.S. at 21. It is conceded and the court below expressly found, that the police officers had no such articulable facts when they seized appellant. 290 A.2d at 581; A. 62.

The *Terry* situation can be divided usefully into three stages: (1) the initial stop; (2) the questioning; (3) the search for weapons. All of these stages are subject to the Fourth Amendment's requirement that the officer

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[46] In this case, it is not a search that is in issue, it is a seizure. Appellant, like the petitioner in *Terry*, complains of an unreasonable "seizure" (*supra*, 392 U.S. at 19). Thus, the cases which treat the issue of valid auto searches (*e.g.*, *Coolidge v. New Hampshire*, 403 U.S. 443; *Chambers v. Maroney*, 399 U.S. 42; *Dyke v. Taylor Implement Manufacturing Company*, 391 U.S. 216; *Preston v. United States*, 376 U.S. 364) are not in point. These cases do not turn on the reasonableness of the initial stop of the vehicle and the resulting seizure of the occupant, but rather on the warrant requirements for an ensuing search of the vehicle. Because the search is not here in issue, there is no occasion to re-examine the holding of the *Preston* line of cases in a traffic violation context. *See, e.g.*, *United States v. Robinson*, ___ U.S. App. D.C. ___, ___ F.2d ___ (No. 23,734, Oct. 31, 1972) (*en banc*); *United States v. Mills*, ___ U.S. App. D.C. ___, ___ F.2d ___ (No. 22,444, May 10, 1972) (*en banc*).

possess articulable suspicion of criminal activity before he acts. In order to pass from one stage to the next, the initially held suspicion must remain unsatisfied. But in order to start the *Terry* process, the initial seizure must be justified by articulable facts:

> "We, therefore, reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full blown search.'" *Terry v. Ohio, supra,* 392 U.S. at 19.

As *Terry* requires articulable suspicion of actual or potential criminal behavior as the predicate for a valid seizure,[67] so *Sibron v. New York,* 392 U.S. 40, decided the same day, illustrates the constitutional test of adequacy for the claimed articulable facts. *Sibron* holds that a patrolman's surveillance over several hours of an individual in contact with known narcotics addicts did not give rise to "the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security." 392 U.S. at 62. *A fortiori,* the officers' momentary observation of appellant—an observation which disclosed only lawful use of the public roads—cannot satisfy Fourth Amendment standards enunciated in *Terry* and *Sibron.* The court below misapprehended these principles when it held:

> "We reject the rigid rule . . . that a police officer may [selectively] stop an automobile . . . *only* when he has articulable suspicion as defined by *Terry*. . . ." 290 A.2d at 582; A. 63.

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[67] The American Law Institute has detailed the Fourth Amendment requirement of articulable suspicion. See, ALI Model Code of Prearraignment Procedure §110.2 and Commentary ¶(6) at 122-23 (1971).

A year after *Terry* and *Sibron* were decided, this Court reaffirmed its holdings that the investigatory stage of a police-citizen encounter is subject to the Fourth Amendment. In *Davis v. Mississippi*, 394 U.S. 721, 724-725, the Court recognized that seizures unchecked by the Fourth Amendment's insistence on reasonable and articulable suspicion would "... subject unlimited numbers of innocent persons to the harrassment and ignominy incident to involuntary detention." 394 U.S. at 726. By holding that the Fourth Amendment protects a person only after he is seized, not before (290 A.2d at 583, n. 24; A. 64 n. 24), the court of appeals has subjected the motoring public to the very "harassment and ignominy" flatly condemned by *Davis*.[68]

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[68] As this Court has pointedly observed:

> "[i]t is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Camara v. Municipal Court*, 387 U.S. 523, 530.

The growing nation-wide practice of "spot checks" shows just how well grounded was the Court's worry.

In the District of Columbia, information gathered in a "spot check," including the name, address, nickname, place of employment, and description of the driver, is recorded on an official police department form. See *Gomez v. Wilson*, 323 F. Supp. 87, 90, n. 4 (D.D.C., 1971). In addition, an unofficial form is used by the Special Operations Division on which is recorded

> "... the name, [and] the address of the person driving, the color of the vehicle, the tag number, and the color [and] the number of occupants in [the car]" (A. 35).

The District of Columbia uses the "spot check" device for pedestrians, as well as motorists. *Gomez v. Wilson, supra.*

In Des Moines, Iowa, police conduct filed interrogations similar to the "spot checks" made in Washington, D.C. There, too, data concerning the stopped person's name, age, sex, physical

In its most recent case involving investigatory seizures, *Adams v. Williams*, 407 U.S. 143, 145, this Court noted that the Fourth Amendment permits an "intermediate response" short of full blown probable cause arrest standards for police-citizen street encounters.[69] Reiterating the Fourth Amendment's "articulable suspicion" standard first enunciated in *Terry*, the Court set forth in precise detail the facts available to the officer in Adams' case and concluded that those facts constituted "articulable suspicion," justifying a "reasonable investigatory stop." 407 U.S. at 146.

From this line of cases, it is clear that the street situation offers no exemption from the Fourth Amendment's protection against unreasonable seizures. Indeed, the requirement that seizures be conducted only when an officer possesses articulable suspicion applies when a pedestrian is stopped as he walks down the street,[70] when a parked motorist is questioned by an officer,[71] when a moving vehicle is stopped for an

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description, address, and the detaining officer's reasons for the stop are recorded and cross-indexed on official police department forms. *Loyd v. Douglas*, 313 F. Supp. 1364, 1366 (S.D. Iowa, 1970).

In San Diego, California, a city of 600,000, 200,000 stops are conducted annually. (ALI Model Code of Prearraignment Procedure §110.2 and Commentary ¶4(c) at 114 (1972).)

[69] Of course, as we argued below, if appellant was "arrested" when his automobile was forcibly stopped, see *Henry v. United States*, 361 U.S. 98, "probable cause," not "articulable suspicion," was required.

[70] *Terry v. Ohio*, 392 U.S. 1 (1968); *Loyd v. Douglas*, 313 F. Supp. 1364 (S.D. Iowa, 1970).

[71] *Adams v. Williams*, 407 U.S. 143; *United States v. Wickizer*, ___ F.2d ___ (8 Cir., No. 72-1138, Sept. 13, 1972).

inquiry,[72] or when a moving vehicle is stopped for a license and registration check.[73]

The Fourth Amendment's command that seizures are reasonable only when conducted with articulable suspicion, carefully enunciated in *Terry*, *Sibron*, *Davis*, and *Adams*, went unheeded by the court of appeals. In its place, that court asserted a "health and safety" exception to the Fourth Amendment's requirements. The exception thus created engulfs the entire holding of this Court's cases insofar as Fourth Amendment protection for motorists is concerned. For reasons which follow, we submit that the judgment cannot be sustained on "health and safety" grounds.

B. The "Health and Safety" Rationale Affords No Justification for Departure from Terry-Sibron-Davis-Adams

The court of appeals held that Fourth Amendment protections against selective seizures unsupported by articulable suspicion do not apply to seizures arguably related to public "health and safety." 290 A.2d at 583 n.

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[72] *United States v. Madrill*, 445 F.2d 827 (9th Cir., 1971), *vacated on other grounds*, 404 U.S. 1010; *United States v. Thompson*, 420 F.2d 536 (3d Cir., 1970).

[73] *United States v. Fallon*, 457 F.2d 15 (10th Cir., 1972); *Young v. United States*, 140 U.S. App. D.C. 333, 336-337, 435 F.2d 405, 408-409 (1970); *People v. Mickelson*, 59 Cal.2d 448, 452-454, 380 P.2d 658, 661-662 (1963); *Martinez v. People*, 169 Colo. 366, 368-369, 456 P.2d 275, 277 (1969); *State v. Cobrizzi*, 161 Conn. 371, 288 A.2d 439, 442 (1971), *cert. denied* 464 U.S. 1017 (1972); *Anderson v. State*, 123 Ga. App. 57, 60-61, 179 S.E.2d 286, 288-289 (1970); *People v. Tassone*, 41 Ill.2d 7, 10-11, 241 N.E.2d 419, 421 (1968); *State v. Valstead*, 282 Minn. 301, 310, 165 N.W.2d 19, 25 (1969); *State v. Rankin*, 477 S.W.2d 72, 75 (Mo., 1972). *But see, United States v. Lepinski*, 460 F.2d 234 (10th Cir., 1972); *but cf., United States v. Ware*, 457 F.2d 828 (7th Cir., 1972).

25; A. 65 n. 25. The judgment in this case cannot be supported on "health and safety" grounds for two reasons: (1) this is simply not a "health and safety" case at all and (2) "health and safety" considerations, while arguably justifying a non-discriminating inspection, cannot justify selective seizures of persons absent articulable suspicion.

1. *This Is Not a "Health and Safety" Case*

We do not think there are any "health and safety" considerations involved in this case.[74] A careful reading of the court of appeals' opinion makes it clear that the court authorized police officers to stop automobiles "to investigate some criminal behavior [] related to the

[74] We fail to see the "health" considerations involved in possession of a driver's license and motor vehicle registration certificate, and we see no "safety" consideration with respect to registration certificates. The motor vehicle registration procedure in both the District of Columbia and Virginia is principally a revenue-raising measure (40 D.C. Code §102 (1967); 40 Va. Code §§46.1-149, 167), and merely by observing the visible license plate, a police officer can readily ascertain whether the owner of the vehicle has complied with the registration requirements. Visual inspection of the certificate, as this record clearly shows (A. 25), is designed to ascertain whether the driver of an automobile is authorized by the owner to operate the vehicle "[b]ecause it's--it's a criminal charge if [he's] not" (A. 26). While registration certificates may provide an informal method of ascertaining ownership of a vehicle, that function is not one normally considered a "safety" matter. Yet, it was the registration certificate, not the driver's license, that motivated the officers to seize appellant (A. 21, 34). This is clear, not only from the officers' testimony (A. 21-22, 25-26) but from the conceded fact that having produced a valid driver's license prior to discovery of the gun, appellant was not free to leave until he had satisfied the officers that he was in possession of a valid registration permit (A. 28) and therefore not committing a "criminal offense (A. 26, 41).

possession of a valid license and valid registration." 290 A.2d at 283, n. 24; A. 64, n. 24). On this record, the court could not properly have affirmed appellant's conviction unless it so held, for the police officer testified that his reason for stopping appellant's automobile was to ascertain whether there were grounds for a "criminal charge" of operation an overdue rental car (A. 26).[75]

This case vividly illustrates the hazards of indiscriminate use of the "health and safety" label. Here, what is termed a "routine spot check" for "health and safety" purposes involved two unmarked cars and four plain clothes officers, one of whom immediately stationed himself on the passenger side of the appellant's vehicle "for the protection of [his] partner" (A. 38) and remained in that position looking for "things in the glove compartment that [the appellant] could be charged with" (A. 40-41). See, *supra*, pp. 5-8. In reality, this was a seizure to investigate possible criminal activity related to use of an automobile. To be sure, the officers stopped appellant, at least in part, to inspect his driver's license and registration certificate. But their motivation for this inspection was not to enforce a "health and safety" regulation but rather to see if appellant was committing a crime (A. 26, 40-41). This is absolutely clear, not only from the officers' own testimony, see, *supra*, pp. 6-8, but from the practice of recording on unnumbered forms

> "... the name, [and] the address of the person driving, the color of the vehicle, the tag number, the

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[75] Contrary to the officers' understanding, it is not a crime to operate a rented automobile with an expired agreement in the District of Columbia. *United States v. McLaughlin*, 278 F. Supp. 320 (D.D.C., 1967).

driver's permit number, and the color [and] number of occupants in [the car]" (A. 35).[76]

The space provided in the forms[76] for officers to describe suspicious activity of autos and pedestrians who are detained shows that these "spot checks" are used not to enforce "health and safety" regulations but to detain and interrogate persons whom the police suspect of criminal activity. The officers' testimony shows that, in this case, such was the goal of the "spot check" (A. 25-26, 35-37). In this regard, the "spot check" can be viewed as a descendant of the police investigatory arrest described in a study conducted by a special committee appointed by the Commissioners of the District of Columbia, *Report and Recommendations of the Commissioners' Committee on Police Arrests for Investigation* (1962). Both "spot checks" and investigatory arrests, by their failure to provide standards that spell out adequate grounds for the seizure of an individual, leave police officers free to halt citizens virtually on whim. *Commissioners' Committee Report, supra,* at 5. The Committee Report, in condemning the practice of investigatory arrests, pointed to the seizure, on clearly unsubstantial grounds, of 6800 persons in the District of Columbia during the two years studied. The impact on each individual seized in an investigatory arrest is severe. However, the adverse impact upon the community of a vastly greater number of investigatory "spot checks" is potent. *Commissioners' Committee Report, supra,* 66-69.[77]

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[76] Official, numbered forms are also prepared and "turned in [and] filed and cross-indexed by name, nickname, stop location, and (for motorists) tag number." *Gomez v. Wilson,* 323 F. Supp. 87, 90, n. 4 (D.D.C., 1971).

[77] The Committee noted that 6800 persons were arrested for investigation during the years 1960-61. Criminal charges were brought against fewer than six per cent of those arrested for

As an eminent jurist has recently observed, one of the hallmarks of this Court has been its willingness to rest "its decisions upon the realities of the situation presented rather than compressing reality into abstract legalism. . . ."[78] The court below invoked an "abstract legalism"—health and safety—without regard to "the realities of the situation presented" by the record. This record, viewed most favorably to the Government,[79]

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investigation. *Commissioners' Committee Report, supra,* at 66-69. By contrast, the "spot check" device is rapidly becoming a nation-wide epidemic involving literally hundreds of thousands of persons. See, *supra,* p. 50, n. 68.

[78] Pahy, *Equal Justice: The Warren Era of the Supreme Court,* 67 Nw.U.L.Rev. 146, 148 (1972).

[79] We do not ask this Court to re-examine the facts. Indeed, although appellant and his witness gave an entirely different account of the circumstances surrounding seizure of the gun, we have limited our argument, both in the courts below and here, to the version of the events given by the police officers. The issue is not what occurred, for we accept the officers' testimony on that score, but the legal conclusions to be drawn from conceded facts.

Where constitutional rights are at stake, this Court is not barred by findings of fact of a state court, *e.g., Whitus v. Georgia,* 385 U.S. 545; *Haynes v. Washington,* 373 U.S. 503, 515-516; *Napue v. Illinois,* 360 U.S. 264, 271-272; *Chambers v. Florida,* 309 U.S. 227, 228-229, particularly where, as here, "a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." *Fiske v. Kansas,* 274 U.S. 380, 385-386. If, as 28 U.S.C. §1257 now states, the District of Columbia Court of Appeals is to be considered a state court for purposes of review here, these principles are *a fortiori* applicable to a case where, on the Government's version of the facts, the court of appeals has nakedly affixed a "health and safety" conclusion. Even if the court of appeals were to be subject to the standards usually applied when a case comes here from a circuit court, the result would be the same. The trial judge made no formal findings of fact and did not rely on a "health and safety" rationale in overruling appellant's

shows that this is not a "health and safety" case at all. Instead, this case involves a police-citizen encounter motivated by the individual officer's desire to see whether appellant could "prove" that his rental car was not overdue (A. 25-26) and encouraged by the police department's practice of completing official and unofficial forms for filing and cross-indexing (A. 35-36); see, *supra*, pp. 7, 50, n. 68). This Court has already laid down the Fourth Amendment's "articulable suspicion" standard for such an encounter, see, *supra*, pp. 48-52, and it is conceded that this seizure cannot pass muster under that standard (290 A.2d at 581; A. 62). The command of the Fourth Amendment and the holdings of this Court's *Terry-Sibron-Davis-Adams* line of cases cannot be avoided, as the court of appeals sought to do, by the mere incantation of an "abstract legalism" divorced from the record. The judgment must be reversed.

2. *In Any Event, Appellant Was Subjected to an "Unreasonable" "Health and Safety" Seizure*

The court of appeals thought the Fourth Amendment inquiry at an end when it concluded that "health and safety" was at stake. 290 A.2d at 582-583; A. 63-65. This Court's Fourth Amendment jurisprudence flatly rejects that approach. *Camara v. Municipal Court*, 387 U.S. 523, 533-534; *See v. City of Seattle*, 387 U.S. 541.[80] Indeed,

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motion to suppress (A. 41-45). This factor was interjected into the case by the opinion of the court of appeals. Thus, the "two courts below" rule is inapplicable, *Bernenyi v. Immigration Director*, 385 U.S. 630, 635; *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275, even if that doctrine might otherwise have relevance to conclusions drawn from uncontested facts where constitutional rights are involved.

[80] That *Camara* and *See* involved searches, and this case a seizure, is immaterial, for the Fourth Amendment bars "unreasonable" seizures as well as "unreasonable" searches. *Terry v. Ohio*, 392 U.S. 1.

the constitutional requirement of "articulable suspicion" for police-citizen street encounters flows directly from *Camara's* holding that salutory reasons for a search or a seizure do not remove conduct from Fourth Amendment scrutiny altogether, although such reasons may justify an "intermediate response" to Fourth Amendment standards of reasonableness. *Terry v. Ohio*, 392 U.S. 1.[81] "Health and safety" considerations, assuming that such exist in this case, are merely factors to be balanced with the fundamental rights protected by the Fourth Amendment in assessing the constitutional reasonableness of a particular intrusion.

Of course, there are obvious safety considerations involved in the operation of automobiles, and we do not contend that driver's license statutes are not related to a valid public safety purpose. Nor do we contend that the Fourth Amendment prohibits *all* police efforts to ensure compliance with licensing statutes.[82] We do contend that the means by which the police seek to achieve this public safety purpose must be carefully balanced against the

[81] See also *Adams v. Williams*, 407 U.S. 143, 145. Even before *Camara*, this Court rejected the notion that a seizure can fall wholly outside the Fourth Amendment protection because of some overriding factor. *Henry v. United States*, 361 U.S. 98, 104.

[82] While, in the abstract, it would seem that "spot checks" for licenses might significantly aid the enforcement of safety laws, empirical studies show that only 1.7 per cent of all motorists drive with revoked or suspended licenses and that a mere .73 per cent of all traffic citations given out are for driving without a valid license. Timberlake, A Study of Procedures Used to Deter Driving While Under Revocation or Suspension, for the Traffic Institute, Northwestern University, 14, 31 (1970). Clearly, the small number of individuals reflected by these figures does not warrant the wholesale abandonment of Fourth Amendment safeguards approved by the court of appeals.

obvious potential of serious Fourth Amendment incursions.

Like most recurring police-citizen situations, the driver's license check had an inauspicious beginning. In 1959, the Florida Supreme Court upheld the use of non-discriminatory and non-selective road blocks designed to ensure compliance with licensing regulations. *City of Miami v. Aronovitz*, 114 So.2d 784, 787 (1959). Clearly recognizing the potentiality of abuse, the court made it clear that selective stops, as opposed to a "systematic check of licenses," would not be permitted. In 1962, Kentucky's highest court made a similar ruling and imposed a similar caveat. *Commonwealth v. Mitchell*, 355 S.W.2d 686, 687 (Ky., 1962). Despite some constitutional objection,[83] the decisions of the Florida and Kentucky courts harmonized the interest in public safety with a citizen's right to be free from unnecessarily intrusive police conduct. In 1966, the court below became the first court to squarely uphold a selective driver's license inspection without requiring that the police officer articulate any reason whatever. *Mincy v. District of Columbia*, 218 A.2d 507 (D.C.C.A., 1966).[84]

Since first approved by the court of appeals in its 1966 *Mincy* holding, selective stops in the District of Columbia have flourished. Stops are now made both of motorists and pedestrians, and formal and informal reports are filed and centrally indexed. See, *supra*, pp. 7, 50, n. 68. This record flatly demonstrates that selective stops for an

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[83] Note, Use of Police Road Block to Inspect Drivers Licenses, 6 Wayne L.Rev. 417 (1960).

[84] Earlier, an Oklahoma court had held such a selective stop violative of the Fourth Amendment unless supported by reasonable cause. *Edwards v. State*, 319 P.2d 1021, 1026 (Okla., 1957).

ostensible safety purpose pose too great a danger to personal freedoms unless subjected to Fourth Amendment safeguards.

We submit that the proper balance between the safety consideration involved in enforcement of the licensing laws and the motorist's right to be free of unreasonable intrusions is that struck by *Camara*, on the one hand, and *Terry*, on the other. Under *Camara*, indiscriminate and uniform methods of checking driver's licenses would, at one and the same time, measurably increase the ability of public officials to enforce the licensing laws[85] while saving motorists against the "harassment and ignominy" incident to involuntary selective stops.[86] Under *Terry*,

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[85] Such periodic, non-discriminatory inspections would doubtless become publicized in a given locality, thus acting as a further deterrent against unlicensed motorists taking to the public streets.

[86] Of course, there may be means other than a road block by which licenses could lawfully be inspected on a non-discriminatory basis. Perhaps police officials, motivated by a dual desire to enforce safety regulations and prevent subordinates from trenching upon Fourth Amendment freedoms, will be able to instruct their officers on other methods by which license inspections can permissibly be made. See McGowan, *Rule Making and the Police*, 70 Mich.L.Rev. 659 (1972). What the Fourth Amendment prohibits, we submit, is a system like that now followed in the District of Columbia where the officer is told to make such stops on any basis he sees fit. See, *supra*, pp. 6, 53-57. That kind of discretion is too dangerous to place in the hands of the policeman on patrol.

Even in a road block situation, or some comparable non-selective inspection procedure, serious Fourth Amendment issues are raised by the practice followed in the District of Columbia of completing official and unofficial police forms and tabulating the information for permanent filing. See, *supra*, pp. 7, 54-55. Such dossier compilations have no place in good faith driver's license inspections.

any motorist for whom a police officer could articulate specific facts warranting a selective stop would also be subject to a driver's license inspection.[87] However, as opposed to the holding of the court below, no motorist can be stopped solely on the whim of a police officer.[88] Thus, even if this was a "health and safety" seizure, it was nonetheless unreasonable and therefore in violation of appellant's Fourth Amendment rights. *Camara v. Municipal Court*, 387 U.S. 523. *See v. City of Seattle*, 387 U.S. 541.

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[87] Curiously, the court below suggests that requiring officers to have articulable suspicion for the initial stop of the auto would result in discrimination against certain groups. (290 A.2d at 582; A. 64). This could only be true to the extent that courts allow membership in such groups to constitute, *pro tanto*, articulable suspicion. If membership in a group, such as those who reasonably appear too young to possess valid licenses, is constitutionally valid "articulable suspicion," there has been no unconstitutional discrimination. On the other hand, the disinterested magistrate or judge who eventually rules on the issue of the adequacy of specific and articulable facts will, of course, reject any asserted facts which impermissibly discriminate against certain groups.

[88] Even before *Camara* and *Terry*, commentators had commended methods such as road blocks as an efficient means of ensuring compliance with licensing laws that was not subject to serious problems of abuse. Comment, *Interference with the Right to Free Movement: Stopping and Search of Automobiles*, 51 Cal.L.Rev. 907 (1963); Constitutional Law—*Use of Police Roadblocks to Inspect Licenses: Commonwealth v. Mitchell*, 37 Conn.B.J. 486 (1963); Note: *The Driver's License "Display" Statute: Problems Arising from Its Application*, 1960 Wash. U.L.Q. 279; McIntyre, *Legality of Stopping a Motorist to Inspect His License or Vehicle*, Highway Safety Research Institute, University of Michigan, *The Enforcement of Traffic Laws: Some Current Legal Problems*, 11 (1967).

CONCLUSION

For the foregoing reasons, the judgment should be reversed and this case should be remanded to the Superior Court of the District of Columbia with instructions to dismiss the indictment for want of jurisdiction. Alternatively, in the event the Court concludes that appellant was not entitled to have his case heard and determined by a court ordained and established in accordance with Article III, the judgment should be reversed and the case remanded for a new trial at which the evidence obtained during an unlawful seizure is excluded.

Respectfully submitted,

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APPENDIX A

PERTINENT PORTIONS OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Article I, §8, cl. 17:

"The Congress shall have Power * * * To exercise exclusive Legislation * * * over such District * * * as may * * * become the Seat of the Government of the United States * * *."

Article III, §1:

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

Article III, §2:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; * * *.

"The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

Fourth Amendment

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

UNITED STATES CODE

28 U.S.C. §1257:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

For the purposes of this section, the term "highest court of a state" includes the District of Columbia Court of Appeals.

DISTRICT OF COLUMBIA CODE

11 D.C. Code §101:

"The judicial power in the District of Columbia is vested in the following courts:

"(1) The following Federal Courts established pursuant to article III of the Constitution:

"(A) The Supreme Court of the United States.

"(B) The United States Court of Appeals for the District of Columbia Circuit.

"(C) The United States District Court for the District of Columbia.

"(2) The following District of Columbia courts established pursuant to article I of the Constitution:

"(A) The District of Columbia Court of Appeals.

"(B) The Superior Court of the District of Columbia."

11 D.C. Code §102:

"The highest court of the District of Columbia is the District of Columbia Court of Appeals. Final judgments and decrees of the District of Columbia Court of Appeals are reviewable by the Supreme Court of the United States in accordance with section 1257 of title 28, United States Code."

11 D.C. Code §721(a):

"The District of Columbia Court of Appeals has jurisdiction of appeals from—

"(1) all final orders and judgments of the Superior Court of the District of Columbia; * * *."

11 D.C. Code §923:

"(a) The Superior Court has jurisdiction over all criminal cases pending in the District of Columbia Court of General Sessions before the effective date of the District of Columbia Court Reorganization Act of 1970.

"(b) (1) Except as provided in paragraph (2), the Superior Court has jurisdiction of any criminal case under any law applicable exclusively to the District of Columbia. * * *"

20 D.C. Code §3204:

"No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years."

40 D.C. Code § 104(a):

"It shall be unlawful–

"(1) for any person to operate any motor vehicle * * * upon any public highway of the District of Columbia * * * if such motor vehicle * * * is not registered * * * or * * * if such person does not have in his possession or in the motor vehicle * * * operated the registration certificate * * *."

40 D.C. Code § 301(c):

"Any individual to whom has been issued a permit to operate a motor vehicle shall have such permit in his immediate possession at all times when operating a motor vehicle in the District and shall exhibit such permit to any police officer when demand is made therefor."